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THE REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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BARRISTERS-AT-LAW.

VOL. III.

1794—1796.

2 VESEY Jr.—3 VESEY (to p. 299)—6 T. R.—2 H. BL.—
1-2 ANSTRUTHER—1 PEAKE; LEACH CR. CA.; 6 BRO. P. C.

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PREFACE TO VOLUME III.

THIS volume covers a comparatively short period. As we come nearer the end of the eighteenth century, the stream of authority widens, and leading cases still familiar to the students (a minority, I fear) who really study cases appear more frequently. *Cutter* v. *Powell* and *Dovaston* v. *Payne*, for example, are both here. Another kind of modern note is sounded by the great case of Boulton and Watt's patents (p. 439), where that "new and useful improvement in fire-engines," the condenser, was solemnly discussed by the Exchequer Chamber.

Among the Nisi Prius rulings in Peake which are still good law, *Tarleton* v. *M'Gawley* (p. 689) may be found to have a fresh interest in these days of the "new Trade Unionism." Some cases, of which *Morley* v. *Gaisford* (p. 432) is a good type, look at first sight as if they belonged to the limbo of dead common-law pleadings, but will be found on closer scrutiny to illustrate living principles. In dealing with cases of this kind, we have felt entitled to remember that we work for all English-speaking lawyers, and that in considerable parts of the English-speaking world the old terms of pleading are not obsolete,

while in one or two American States there has not even been any organic change comparable to our Common Law Procedure Act of 1852.

Since Vol. II. was prepared for the press, a certain number of minute errors have been discovered in Vol. I., being in great part only too faithful reproductions of misprints or clerical errors in the original reports. These have been corrected in the stereotype plates, and will accordingly disappear in any future issue. Possibly a longer incubation might have prevented them altogether, but I doubt if it would, and in any case time is of the essence of this undertaking, so far as speed can be made consistent with substantial accuracy and considered judgment.

In one or two quarters a desire has been expressed for continuous annotation, somewhat after the manner of a well known American series of selected reports from various jurisdictions. But we need not inquire how far such notes could or would (at least in this country) be of practical utility; for it is certain that if the Revised Reports had been laid out on any such plan we should not yet have published the first volume. Our object is to supply the profession with the text of the modern authorities of the law, not with our opinions about them. At the same time we have now thought it harmless, and possibly useful, to be rather less sparing of references to later decisions; and arrangements for adding American references are under consideration.

All editorial notes which are not merely verbal notes on the state of the reporter's text will henceforth be distinguished by the initials of one of the editors. Notes not so marked are notes to the original report or the current edition thereof. We need not remind the learned reader that we are approaching the period of some such notes which have become classical by judicial approval.

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In case any one should think we have preserved too many Nisi Prius decisions, it may be pointed out that such decisions are often the only recorded judicial authority for rules of practical importance and constant application.

We have again placed in this volume a certain number of cases, mostly from Leach and Peake, of earlier date than the general mass. This has been thought preferable to breaking up volumes of these reporters into detachments or isolated cases; a course which would have destroyed the reader's practical convenience of seeing, by a glance at the back of any of our volumes, what volumes of the old reporters it includes. Similar causes produce a small overlapping of dates between the present volume and the fourth.

F. P.

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The Revised Reports.

VOL. III.

CHANCERY.

CHALLONER *v.* MURHALL.*

(2 Vesey Jr. 524—525.)

1795. *Feb.* 20.

LOUGHBOROUGH, L.C.

[524]

Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son; who by will charged all his real estate with debts and legacies; and devised it to his brother for life with various remainders: the estates in the copyhold are barred.

At a Court Baron held for the manor of Doddington, in the county of Salop, Dec. 6th, 1728, William Murhall and Mary his wife in performance of articles entered into previously to their marriage surrendered two closes of customary land called Greenfield to the use of themselves for their lives, and that of the survivor; remainder to the use of William their son in tail; remainder to the use of John Murhall their second son in tail; remainder to the use of the third son of the said William Murhall upon the body of the said Mary his wife lawfully begotten or to be begotten in tail; remainder to the use of the fourth, fifth, and all and every other son and sons of the body of the said William upon the body of the said Mary his wife severally and successively in tail; remainder to the use of the daughters in the like manner; remainder to the use of the right heirs of the said William Murhall for ever. Mary Murhall died in 1747; William Murhall the eldest son, having previously died an infant, without issue. John, Thomas, and two daughters

* *Re Hart* (1889) 41 Ch. D. 547; 58 L. J. Ch. 752.

1795.
CHALLONER v. MURHALL.

were the surviving children. By indentures of lease and release 24th and 25th September, 1762, between the Duke of Bridgewater, who was seised in fee of the manor, of the first part, and William Murhall the elder of the second part, all the said premises were among others granted, released and confirmed to the use of the said William Murhall, his heirs and assigns for ever, freed, enfranchised, and absolutely discharged of and from all rents, yearly and other payments, fines, heriots, suits, and services, whatsoever, by usage, custom, prescription, or otherwise howsoever (except the services to be performed at the court leet of the said manor); and the said Duke did thereby remise, release, and for ever quit claim to the said William Murhall, his heirs, executors, administrators and assigns, all heriots by virtue of any custom usually paid by him, or which might thereafter become due, to the intent that such heriot or custom might be abolished and for ever discharged. William Murhall the settlor made his will; but did not dispose of the said premises or the freehold thereof. He died soon afterwards; and the premises [*525] descended to John Murhall, his eldest son and heir, who by *his will, dated August 11th, 1791, after charging all his real estate with his debts and legacies, devised the same to his brother Thomas for life; remainder to his first and other sons in tail, with several remainders over. John Murhall died soon afterwards.

In this manor no recoveries were suffered: but estates tail were barred by surrender. The bill was filed by legatees. The Master reported, that the said premises called Greenfield were charged by the will; to which report exceptions were taken.

Mr. Mansfield, *Mr. Graham*, and *Mr. Short*, for the exceptions:

If the enfranchisement is to have any effect as to those in remainder, a court of equity would consider it as taken for the benefit of all interested in the estate. The tenant in tail might have barred the remainder by recovery: but as he has not, it must take effect. *Dunn* v. *Green*, 3 P. W. 9, is referred to *Parker* v. *Turner*, 2 Ch. Ca. 174. 1 Vern. 392, 458; which is no authority for it; for clearly thirty years possession by a pur-

chaser was a sufficient answer to the bill by the heir of the copyholder in tail. The reporter makes a *quære* upon *Dunn* v. *Green* as to a vested remainder. Vin. Ab. tit. Copyhold, 158, s. 19, 24; 205, s. 15; 213, s. 2; 215, s. 1.

Solicitor-General, for the plaintiffs:

The *quære* in P. Will. is not founded. It is not like a freehold; for the same act bars both the issue and remainderman.

LORD CHANCELLOR:

It is impossible that any equity could keep alive this intail. Thomas Murhall never could have had a bill against his father and elder brother. No one could have a right against the tenant in tail. The case by Lord JEFFERIES proves a plain proposition; that when the interest of the lord in the manor is united with the copyhold in tail, there must be a merger; for the method of barring it cannot exist.

INSTITUT

REES *v.* BERRINGTON.*

(2 Vesey Jr. 540—544.)

1795.
April 28.
LOUGHBOROUGH, L.C.
[540]

Obligee in a bond with a surety without communication with the surety takes notes from the principal, and gives farther time: the surety is discharged.

THOMAS, Daniel, and Richard Blachford carried on business as lacemen in partnership till the death of Thomas. On taking the accounts a balance of 2,972*l.* 3*s.* 5*d.* appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas; to secure which sum and 466*l.* 13*s.* 4*d.* agreed to be secured to Robert Pope Blachford as Thomas's share of the debts due to the partnership a joint and several bond dated September 31st, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest by instalments upon the 31st of December, 1789, and the 31st of December, 1790. In the beginning of September, 1790, Robert Pope Blachford died.

* *Bolton* v. *Salmon* (1891) 2 Ch. 54.

1795.

REES v. BERRINGTON.

Upon the 27th of September, 1790, the whole of the money and interest secured by the bond remaining unpaid, James M'Kenzie under the authority and on behalf of the executors of Robert Pope Blachford came to an arrangement with Daniel and Richard Blachford concerning the money due on the bond and the interest; and for the first instalment due on the bond took their promissory notes payable on the 21st of April, 21st of July, and 21st of October, 1791, and the 21st of January, and 21st of April, 1792; and for the second instalment to become due upon the bond, took three other promissory notes payable on the 21st of July, and 21st of October, 1792, and the 21st of January, 1793. Daniel and Richard Blachford at different times on and before the 18th of October, 1792, paid to the executors of Robert Pope Blachford or to M'Kenzie on their behalf, the first three of the first set of notes, and the interest due upon them; and about the 20th of October, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22nd, 1792, and payable on the 25th of May, 25th of June, 25th of September, and 25th of December, 1793. About the 7th of December, 1792, a commission of bankruptcy issued [*541] against *Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved under that commission a debt of 2,327*l.* 14*s.* 11*d.* by virtue of the bond and the four notes dated October 22nd, 1792. Rees was captain of an East India ship, and left England in April, 1788; returned in August, 1789; sailed again in April, 1791, and returned in July, 1792. In August, 1792, he had in his hands the sum of 3,000*l.* received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford respecting their transactions with Daniel and Richard, he in November, 1792, paid over that sum to the Blachfords. After the bankruptcy the executors brought an action against Rees for 2,400*l.* as remaining due on the bond; upon which he filed a bill for an injunction.

Solicitor-General and *Mr. Hollist*, for the plaintiff:

Skip v. *Huey*, 3 Atk. 91, *Nisbet* v. *Smith*, 2 Bro. C. C. 579, and many early cases support this bill. This plaintiff could

have indemnified himself by the money he had in his hands in 1792. A surety is bound as such for the debt and risk described in the instrument, in case the principal does not pay. The creditor has no right to increase the risk without consent of the surety; and therefore cannot vary the original contract; for that varies the risk. If the holder of a bill of exchange gives time to the acceptor, the indorser is discharged; because he is simply a surety. The principle is the same upon policies of insurance in cases of deviation, however slight; Westcot upon Insurance, 178.

LORD CHANCELLOR:

It is perfectly settled; and even where it is demonstrable, that the alteration was perfectly immaterial: as in the case of an African ship, that was to sail from Lancaster with so many men: in fact she took part of her men at Beaumaris.

Mr. Graham, for the defendants:

It is not received as a general principle, that the obligee in a bond is bound to call for the money on the very day: it seldom happens, that the obligor thinks of paying at the day, or that the obligee puts the bond directly in suit. The rule as to the indorser of a bill of exchange arises from the course of trade, which requires it. A surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. The circumstance *of his remedy in this Court marks the difference [*542] between the cases. Still more different is the case of insurance; from the general course of trade that undertaking to indemnify against any loss in one particular voyage must be strictly adhered to. Here is nothing like a fraudulent intention to throw the burthen on the plaintiff. It is too much to say, he is to be discharged, because they did suspend the action a short time; and it is not too much to assume, either that the indulgence was with his concurrence, or that he was guilty of negligence, as he was in England a considerable part of the time, and might have called on them to put the bond in suit: and then he would have discovered, that they had bound themselves not to do so. In *Nisbet* v. *Smith* ulterior time was given against the

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express directions of the surety; upon which Lord THURLOW relied. *Heath* v. *Percival*, 1 P. Will. 682, is a stronger case. There Percival might be considered only as a surety in a bond; and the time of payment was varied.

LORD CHANCELLOR:

Percival never could be a surety; whether that case is right or wrong. He should have taken up his bond, if he went out of the trade.

The form of the security forces these cases into equity: but take it out of that form, and suppose in this instance, that the plaintiff was a surety by a proper bond at law as surety; what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading, that he is bound as surety: but if he could establish that at law, the principle at law is, that he has an interest in the condition; and if the period is extended, that totally defeats the condition; and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety: he does not become bound to answer the engagement at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals: but establish the fact, that he is surety; he is surety to a definite, not an indefinite, engagement. Here upon the second instalment the defendants have extended the time, before that instalment became due: if the time is extended after it becomes due, that makes a *difference at law; for then the bond has been once forfeited. It is perfectly plain from the nature of the engagement, that the plaintiff became security, that the debt should be paid at two periods: one has elapsed: the obligee thinks fit totally to change the nature of the security and the credit: he takes notes: gives a farther time of payment; and repeats the same thing as to the second instalment, which was not then due; and doing this he does this material injury to the surety: he has a right the day after the bond is due to come here and insist upon its being put in suit: the obligee has sus-

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pended that, till the time contained in the notes runs out: therefore he has disabled himself to do that equity to the surety, which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that, which the nature of the relation between the surety and the person, with whom he is bound, requires. It is a breach of the obligation in conscience and honesty; and it is not too much to say, of that obligation in point of law. I cannot try the cause by enquiring, what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security: I do not ground much upon it; for the case would be the same, if those circumstances had not come out clearly in evidence. This produces no inconvenience to any one; for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person, who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement.

The authorities fully warrant me in this: though I should have granted the injunction even without that strong authority before Lord Thurlow; which is rather less favourable for the *surety. There the creditor being called upon did put the bond [*544] in suit. If he had proceeded, the consequence would have been only, that he would have had the person in custody: it would have been no payment: thinking, that by leaving the debtor at large and taking a judgment against him, which affected all his property, he pursued a better mode, using his discretion and

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acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison: but he did it without consulting the surety; and therefore Lord THURLOW held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous: after circumstances of communication, that shewed great embarrassment, great difficulty, and great distress, indulgence was from time to time given under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who in the interval had given up the fund, which probably was the inducement to him to be the security.

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March 2.
April 30.
May 1 *and* 2.
1797.
Nov. 15, 16, 21, & 22.
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(2 Vesey Jr. 544—563.)

A. tenant in tail with power to lease, remainder to B. wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power made leases exceeding his power, reciting that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him: A. by his will devised the said estates and others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter and her first and other sons, and to D. and his first and other sons, successively in the same manner; and gave to B. and C. certain interests in his personal estate; and gave the residue to D.; who filed a bill to have the will established: B. elected to take her estate tail in opposition to the will: which the Master reported to be for her benefit: after her death C., who had taken under the will, claimed as tenant by the curtesy; and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements: neither the lessees nor D. are entitled to stop the ejectments or to put C. to his election.

SIR WILLIAM PULTENEY, who died in 1691, by his will dated April 30th, 1685, [devised certain estates (including property in Sackville Street, Piccadilly) in strict settlement upon his issue male, with various remainders to his issue male and female.]
[*545] *The testator gave all other his lands, tenements, and heredita-

ments in the county of Salop, and all his leasehold estates whatsoever, except the house he lived in, to his trustees in trust to be disposed of for payment of his debts and certain other purposes; and directed the surplus of the purchase-money to be laid out in the purchase of real estates of inheritance, to be settled to the same uses as the devised estates. * * *

By Act of Parliament 5 Geo. I. it was enacted, that it should be lawful for [the persons therein named] who should be actually seised of the freehold of the premises therein mentioned or any part thereof by virtue of the will of Sir William Pulteney, at their respective ages of 21 years to make leases for 61 years in possession and not in reversion; reserving for the first year such rent as the lessor should think fit, and afterwards not less than three parts in four of the highest yearly rent, that could be obtained. [546]

[Under the above will in the events which happened the testator's grandson, General Pulteney, became entitled to the devised estates as tenant in tail male in remainder expectant upon the death of his brother (the Earl of Bath), with remainder to Frances Pulteney, the wife of William Pulteney, in tail. The said Earl of Bath erroneously supposing himself to be entitled to the estates in fee simple by virtue of a recovery suffered by him in 1753, devised part of the said estates (including the Sackville Street property) to his brother General Pulteney in fee simple.

Upon the death of the Earl of Bath in 1764,] General Pulteney entered into possession of the estates Lord Bath was seised of under the will of Sir William Pulteney, and otherwise; and in consideration of fines paid by the lessees or assignees of the leases of the tenements in Sackville Street, and of the rent agreed to be paid and the covenants entered into by them he granted reversionary leases for thirty-four years to commence after the expiration of [certain] leases granted by Lord Bath; which reversionary leases in addition to the remainder of the unexpired terms would complete the full term of sixty years; and the lessor reciting that he was seised of an estate of freehold and inheritance in the premises covenanted for quiet enjoyment [549]

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against himself, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their, acts, means, default or procurement. The rent reserved upon these leases did not amount to three parts in four of the highest yearly rent, that could be obtained.

General Pulteney by his will dated August 14th, 1767, devised all his messuages, grounds, lands, tenements, hereditaments, and real estate in the counties of Middlesex, Somerset, Montgomery, Salop, and York, except the reversionary estate expectant upon the death of John Newport without issue in the estate of the [*550] late Earl *of Bradford, to Lord Chetwynd and Sir Harry Burrard and their heirs to the use of them, their executors, administrators, and assigns, for 500 years upon trust to raise and pay certain annuities; and subject thereto to the use of the testator's cousin Frances Pulteney wife of William Pulteney, for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of her first and other sons successively in tail male; remainder to the use of Henrietta Laura Pulteney daughter of the said William and Frances, and her first and other sons, and of Henry Earl of Darlington, and his first and other sons, successively in the same manner; with other remainders over, and the ultimate remainder to the testator's right heirs. The testator devised and appointed the remainder or reversion and all other his reversionary estate and interest expectant upon the death of the said John Newport without issue of his body in the estate of the late Earl of Bradford, and all his estate and interest in the said manors and other hereditaments (subject to the said mortgage of 38,136*l.* 16*s.* 1*d.*), to his said trustees and their heirs to the use of the said William Pulteney and his assigns for life, without impeachment of waste; remainder to the use of the said Frances his wife for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of the body of the said Frances successively in tail male; remainder to the use of Lord Darlington and his first and other sons in the same manner, with other remainders over,

and the ultimate remainder to the testator's right heirs. Then reciting, that by the will of Lord Bath and as his executor and residuary legatee he was entitled to the sum of 38,136*l.* 16*s.* 1*d.* secured by mortgage on the estate of the late Earl of Bradford, and that George Colman was entitled to receive a moiety of the interest of that sum for life, he gave the said sum and all the interest from his death, and all his estate, right, and interest, in the said mortgage to his executors, their executors, administrators, and assigns, upon trust, so long as the principal should continue due, to pay the interest, after deducting such part as George Colman was entitled to for life, to the said William Pulteney for life; and after his death to the said Frances Pulteney for life; and after the death of the survivor to such person or persons, as should for the time being be entitled by the limitations of the testator's will to the estate of the late Earl of Bradford; and he directed, that if the mortgage-money should be paid in, it should be invested in *Government or real securities. [*551] The testator gave all his household goods, furniture, linen, plate, and utensils, which should be in Bath House, Piccadilly, at his death, and all his pictures in the said house, except such as were otherwise disposed of to his executors in trust to permit the same to be used by the said Frances Pulteney; and he gave all his money, securities for money, goods, chattels and personal estate whatsoever, not specifically disposed of, to his executors, upon trust to pay his funeral expenses, debts, legacies, and annuities; and to lay out the residue in the purchase of estates in fee simple, and to convey the same to the use of Lord Darlington for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; with other remainders over; and he appointed Lord Darlington, Lord Chetwynd, William Pulteney, and Sir Harry Burrard, executors.

General Pulteney died October 26th, 1767, without issue, leaving Frances Pulteney, wife of William Pulteney, Esq., his cousin and heir-at-law, and also heir of the body of Sir William Pulteney, the original testator; under whose will she, upon the death of General Pulteney, became entitled to and claimed an estate tail in such of the lands and hereditaments devised or

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intended to be devised by him, as had been devised by Sir William; insisting, that the estates comprised in the [recovery] of 1753 did not pass by the will of Lord Bath to General Pulteney. * * Upon the death of General Pulteney Mr. Pulteney under his will received a moiety of the interest of the mortgage upon the estate of the late Earl of Bradford.

By indentures of lease and release June 1st and 2nd, 1772, William and Frances Pulteney conveyed all their estates, late the estates of Sir William Pulteney, or which had been purchased by the trustees of his will with his money, or whereof they or either of them, or any persons in trust for them, were seised of any estate of freehold or inheritance, to Sir Richard Sutton, to the use of him, his heirs and assigns, upon trust from time to time to convey all the said estates to the use of such persons, and for such estates, intents and purposes, as Frances Pulteney by her deed executed in the presence of two or more credible witnesses should from time to time notwithstanding her coverture alone during her life direct, limit, or appoint; and in default of and until such direction upon trust to execute all such acts [*552] touching the premises as she should *from time to time during her life direct; and in case she should die before such direction, or in case any interest should remain undisposed of by her, upon trust to convey the same to the use of such persons, for such estates, intents and purposes, as she should by her will executed in the presence of three witnesses, direct, limit, or appoint; which will it was thereby declared she should have full power to execute notwithstanding her coverture; and it was declared, that nothing in the said indentures should preclude William Pulteney from his right of curtesy, or to make his election whether to abide by the devises and limitations in his favour under the will of General Pulteney, or any other rights, interests, or claims, he might have by any other ways whatsoever; nor prejudice any such right, title, or interest of him in any lands, tenements, goods, or chattels, under the will of General Pulteney, or by any other means; and it was declared, that nothing in the said indentures should import, that Frances Pulteney had made her election to abide by the will of Sir William Pulteney and refuse to abide by that of General Pulteney.

Upon the 13th of June, 1772, recoveries were suffered to the use of Sir Richard Sutton and his heirs upon the trusts of these indentures.

In 1768 a bill was filed by Lord Darlington, and his son, the infant tenant in tail, to have the will of General Pulteney established and the trusts carried into execution, and that it might be declared, that William and Frances Pulteney had no right to any part of the real estates, late of Sir William Pulteney, or which were purchased with any part of his personal estate, nor to any of the sums of money or annuities claimed by them; or if the Court should be of opinion they had any right thereto, then that they should make their election.

[The cause being heard in 1774 a case was directed for the opinion of the Court of King's Bench upon the question of title. The LORD CHANCELLOR in consequence of the certificate on such case decreed the will of General Pulteney to be established; and declared that the premises comprised in the recovery of 1753 enured to the uses mentioned in the will of Sir William Pulteney;] and it was ordered, that Frances Pulteney should make her election to take under the will of Sir William Pulteney or under the will of General Pulteney; and if she should elect to take an estate tail under the former, then she should not be entitled to any estate under the latter. This decree was affirmed upon a rehearing before the Lord Chancellor, Chief Justice De Grey, and Mr. Baron Eyre; and it was referred to the Master to enquire, under which will it would be most beneficial to Mrs. Pulteney to take. The Master reported, that it would be most for her benefit to take under the will of Sir William Pulteney; and she having under an order of Court laid proposals before him, that a value should be set upon the whole of the devises in her favour by the will of General Pulteney, and that she should secure that value in trust for the uses of the said will by a charge upon the estates of Sir William Pulteney, and in consequence thereof should enjoy the several devises and bequests to her in the said will, he certified, that supposing her to have made her election to take the estate of Sir William Pulteney, and that she and the defendant William Pulteney did account for the rents and profits of the estates of General Pulteney received since his

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death, and secure the amount with interest as the Court should direct and also the proper and full value to be put upon the whole of the devises and bequests in her favour by the will of General Pulteney with interest; and if the defendant William Pulteney should be restrained from cutting timber upon the estate of General Pulteney without leave of the Court, and be bound to keep the estate in repair during the life of his wife, he was of opinion, it might be for the benefit of the infant devisees in remainder under the will of General Pulteney to accept such compensation in order to put an end with regard to the infants to all risk depending upon the life of the said Frances Pulteney. The cause came on for farther directions on the 28th of January, 1778; when it was ordered, that those proposals should be held an election to take the estates of Sir William Pulteney, and the necessary directions were given for taking the accounts and carrying those proposals into effect; which took place accordingly.

Frances Pulteney on the 1st of June, 1782, made her will in pursuance of the power reserved to her by the indentures of June, [*554] *1772, and all other powers, &c.; and directed, that immediately after her decease Sir Richard Sutton should convey all the said houses, lands, tenements, and premises, whereof the recoveries were suffered in the year 1772, and the fee simple and inheritance thereof, to trustees and their heirs to the use of Lord Sandys and Andrew Stewart, their executors, administrators and assigns, for 1,000 years; and subject thereto to the use of her first and other sons in tail; remainder to the use of her daughter (afterwards Lady Bath) for life; remainder to trustees to preserve contingent remainder; remainder to the use of her first and other sons in tail male; remainder to the heirs of the body of the testatrix; remainder to the use of William Pulteney, her husband, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of his first and other sons by any future wife in tail male; remainder to the use of all and every his daughter and daughters by any future wife in such shares, as he by any deed or writing should appoint; in default of appointment, equally among them as tenants in common; and for default of such issue to the use

of Sir Richard Sutton, his heirs and assigns for ever. The trust of the term was declared to be to raise annual or other sums of money for such person or persons, and in such shares, proportions, manner, &c. as the testatrix should by any codicil appoint; and to permit the residue of such rents to be taken by her husband for life; in case he should not in the meantime under the will of General Pulteney come into possession of the estates of the late Earl of Bradford; and after the death of her husband or his coming into possession of those estates to pay such residue of the rents to the person or persons entitled to the reversion or remainder for the time being, expectant upon the said term.

Frances Pulteney died on the 1st of June, 1782, leaving her husband surviving, and Lady Bath, their only issue. William Pulteney upon the death of his wife entered into possession and receipt of the rents and profits of the estates devised or intended to be devised by General Pulteney, and particularly of the estates devised by Sir William Pulteney, and those purchased by the trustees and settled to the uses and trusts of his will. John Newport died in April, 1783, unmarried and without issue; upon which William Pulteney under the devise to him of the reversion of the estates of the late Earl of Bradford in the will of General Pulteney entered *into possession and receipt of the rents and profits of these estates; and cut and sold timber; and from the death of General Pulteney he received the interest of one moiety of the sum of 38,136*l.* 16*s.* 1*d.* charged by mortgage upon those estates. In 1791 William Pulteney as tenant by the curtesy under the will of Sir William Pulteney brought actions of eject ment against the several tenants in Sackville Street; upon which those tenants, some of whom had laid out considerable sums upon their respective tenements, filed a bill against William Pulteney, Lady Bath, and Lord Darlington (tenant in tail, and son to Lord Darlington deceased, who was devisee for life, under the will of General Pulteney), praying, that their leases might be confirmed; and that the defendant William Pulteney might be restrained from proceeding in the ejectments brought and from bringing any other action against the plaintiffs; or if the leases could not be made effectual, that the plaintiffs might be declared entitled to a satisfaction out of the personal assets of

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General Pulteney or some other fund. The other bill was filed by Lord Darlington, as devisee in remainder of the real estate, and in respect of the interest in the residue of the personal estate, of General Pulteney under his will, which would be liable to make satisfaction to the tenants, if they should be evicted. The prayer of that bill was, that the defendant William Pulteney might by his several acts be declared to have elected to take under the will of General Pulteney; and might be declared a trustee as to such right and interest, as he was entitled to as tenant by the curtesy or otherwise in the estates and premises late of Sir William Pulteney, or purchased with his trust-money pursuant to the directions of his will, for the benefit of the persons entitled under the will of General Pulteney; and that he might be decreed to convey and account accordingly, and be restrained by injunction from all farther proceedings in ejectment or proceeding in any manner at law to turn the tenants out of possession; and if the Court should be of opinion, that the acts done by him did not amount to an election, that he might be decreed to elect.

The defendant William Pulteney by his answer contended, that the leases were granted for an inadequate consideration; [556] and that * * General Pulteney at the time of granting such leases had in possession only an estate tail; and that upon his death Frances Pulteney, late wife of the defendant, became tenant in tail of the said premises; and he insisted on his title as tenant by the curtesy upon her death.

Solicitor-General, *Mr. Mansfield*, and *Mr. Lloyd*, for the plaintiffs, in support of the motion for an injunction:

In *Bigland* v. *Huddlestone*, 3 Bro. C. C. 285, n. Lord THURLOW said it was against conscience for a devisee to disappoint the will; and held, that the doctrine of election applies equally to a deed. Mr. Pulteney takes the Bradford estate under the will of General Pulteney; shall he then turn the lessees of his testator out of possession? In this case there can be no compensation; for the defendant takes away the yearly value so long as he insists upon his title as tenant by the curtesy; the only compensation therefore would be, that he should receive the profits as a

rack-rent, and pay them over to the lessees as he received them. Lord Darlington is entitled to restrain the defendant in two capacities; as a disappointed devisee, and as devisee of a fund, which will be liable to make satisfaction to the lessees. General Pulteney thought he was tenant in fee; and therefore did not make leases under the power. The recital in the leases, that the lessor is seised of an estate of freehold and inheritance, must mean such an estate of inheritance as would make the leases good: viz. an estate in fee-simple. What has been done can at most amount only to mistake and a defective execution of a power; which this Court will make good: *Campbell* v. *Leach*, Amb. 740; where the lessee was considered as a purchaser, and like any other purchaser entitled to the aid of the Court. The Court will relieve, if the excess of the power can in any way be measured; and in this instance the Court sees the bounds of the excess. The defect in the reservation of rent is not such, that the Court cannot cure it, if by inquiry it can be found, what really was three parts in four of the highest yearly rent, that could be obtained at the execution of these leases. But if the leases cannot be made good, the lessees will have a remedy under the covenant for quiet enjoyment; for their leases are defeated through the default of the lessor in not suffering a recovery. The assets both real and personal are liable; and Mr. Pulteney must be the accounting party. Therefore why ought not the tenants to continue in possession instead of being turned round to a compensation?

Attorney-General, *Mr. Grant*, and *Mr. Alexander*, for the defendant *Mr. Pulteney:* [557]

Neither the lessees nor Lord Darlington can put Mr. Pulteney to election. There is no expression in the will to give them such an equity. The leases are clearly void at law; and the right the lessees have is an action of covenant at most. The utmost they can claim is compensation; not that they should continue in actual possession. There is no doubt Lord Darlington's interest might be compensated. *Campbell* v. *Leach* is a clear authority against substantiating these leases in equity. Lord Darlington now agitates a question, in which he has no interest. There is

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no disappointed devisee; for supposing the will to operate, Lady Bath has a present estate for life in the Middlesex estate: therefore if Mr. Pulteney holds against any one, he holds against her. If she dies in his life without issue, then he will hold against the remainder-man. But supposing they have a right, Mr. Pulteney takes by the will, but claims nothing against it. His tenancy by the curtesy is not a claim against it. That is taken by a title wholly unconnected with the will. The party entitled by a right paramount to that of the testator says, he does not abide by the disposition of the will. It is as if this property had never been introduced into the will. Mrs. Pulteney was driven to her election, and a compleat compensation was made to the parties disappointed by her election to take the estate tail against the will. There cannot be a second election. She took that estate with all its incidents; one of which is tenancy by the curtesy. The defendant does not claim a distinct independent estate, but the benefit of her estate tail. If they succeed in putting him to election, it would reduce her estate tail to an estate for life. Tenancy by the curtesy is part of the inheritance; Bac. Abr. tit. Lease, I, 1. 397. The lessees taking nothing by the will cannot put any one to election. The obligation is not to disappoint any other person claiming under the same will without making compensation; which is to be subject to the same limitations as what is taken away. That shews, the party compelling the election must be a person taking under the will. If he is obliged to relinquish the Bradford estate, yet it could not be settled to their use. There is not much discussion upon this claim to be found in the writers on our law, but the writers upon other laws hold, that it extends to all takers under the same instrument, but not under different instruments. The claim of election is said to have been applied by Lord THURLOW to a deed: but the parties claimed under the same deed. Lord Darlington *has no more equity to have the residue clear, than if any devisee claimed a debt. The residue is only given subject to every demand upon it. What species of debt, whether by covenant or in any other way, is immaterial. The compensation is to be recovered, not against Mr. Pulteney, but out of Lord Darlington's residue; though in point of form the action must be against Mr. Pulteney

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as executor: but he is a mere trustee. If they get the injunction instead of a compensation from the assets, the whole loss will fall on Mr. Pulteney. The doctrine as to circuity of actions cannot apply, where the subjects of them are of different descriptions, as land and money. But if the compensation is to be recovered against him as executor, it cannot control his absolute right as proprietor; which he may exercise just as if this stranger, for so General Pulteney must be considered, had done nothing.

Reply:

This cause is argued on a mistake, viz. a supposition that the leases are invalid: they are valid against all persons claiming under General Pulteney; invalid only as to Mrs. Pulteney and those claiming under her election. General Pulteney meant to dispose of this property as if he was seised in fee; and whoever says he was not seised in fee, impugns the disposition made by him. The tenancy by the curtesy is part of that intended to be disposed of by the will; for he meant that upon the death of Mrs. Pulteney Lady Bath should enjoy immediately as tenant for life; therefore the defendant claims what General Pulteney meant to go in a different succession. The true rule has been, that all persons claiming any estate, in any property given by a will, under a title vested in them upon the death of the testator, and at the same time claiming benefits under that will, must relinquish the one or the other. The ground is an implied condition; which does not apply to a title vested subsequently. Here his estate as tenant by the curtesy was vested at the death of General Pulteney. It makes no difference that his title arises by act of law: that is the case upon dower: So in *Cowper* v. *Scott*, 3 P. Will. 123, and other cases upon the custom of London. * * *

LORD CHANCELLOR: [559]

I feel great difficulty in this cause. It is impossible not to feel a great inclination to support the case for the lessees. In their treaty with General Pulteney they went upon the faith of his apparent situation; presuming, and not rashly presuming,

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him absolute master of the estate. To all appearance he was so. From the apparent circumstances of the family he was, and in substance he was, the owner; for it was always in his power by an easy act to make himself so. They contracted with him under an apprehension founded on his great opulence and his situation with respect to the estate, that he was capable of giving them an indefeasible title. By subsequent events and upon looking more narrowly into it that title, which in truth was absolute in him at the time, or might have been made perfectly so by a trifling expense on his part, and which would have been done, if the parties acting for him had looked more accurately into it, is defeated, and by persons taking very large advantages under his will. If I could decide upon the cause separately from any legal reasoning upon it, I should have a strong inclination to pronounce immediately in favour of the lessees: but considering [*560] it as it is, and taking General *Pulteney to have been, as he was, incapable of making these leases, and that they are void at law, I am greatly at a loss upon any stable rule to support the case either of Lord Darlington or the lessees. Lord Darlington claims in two characters: as a disappointed devisee he would have the common equity of the Court to oblige every person claiming benefits under the will to make compensation for a claim against the tenor of that will in his favour. Upon that ground a bill was filed in this Court. The principle is very justly stated by Chief Justice De Grey; that it is not a case of express condition; it is no forfeiture of interest: but the Court lays hold of what is devised; and makes compensation out of that to the disappointed party. I have looked at my note of the opinion of Chief Justice De Grey and Mr. Baron Eyre, and the argument. The point was much considered; and Chief Justice De Grey goes very fully into it: it certainly was not determined; the event of the offer of Mr. and Mrs. Pulteney put a stop to all determination upon it. It was argued first, that the devise being on no express condition, it could not be implied; then, that she could not be put to her election, because she had no alternative; being a married woman, it was contended, she could not defeat her husband's right. In answer to that the Chief Justice distinguishes the equity of this Court from an express condition;

"which," he says, "must be performed as framed; and if it is not, that will induce a forfeiture; but the equity of this Court is," (as he very well expresses it) "to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee." Then he takes up that part of the argument upon her supposed disability to do that, which in one case submitting to the will, she must do; that is, renounce the estate tail. He says, "her being a *feme covert* has no effect: her disability is not like that of an infant." He then refers to the case of frank-marriage in Littleton: and says, "the election is her's and the husband's: a married woman may forfeit a conditional gift: the estate is "in her; he takes in her right. If they disagree, it must be considered by the Court, what is most for her interest;" (and accordingly there was a reference to the Master in this cause, which excludes Mr. Pulteney entirely) "if he is considered as having an estate, that must rise and fall with her's, it is the most favourable supposition for him; because otherwise he takes against the will." In that view he considers Mr. Pulteney's interest to be totally in the power of the wife; the whole estate to be in the wife; her election, if to take *under [*561] the will, enabling her to dispose of the whole estate tail, and consequently of his estate by the curtesy. Mr. Baron EYRE says, the husband's interest is only an emanation from the wife's estate.

That suit has had full effect as to Lord Darlington. The person, who claimed against the will, and had the whole estate at that time, was Mrs. Pulteney. She took beneficial interests under the will. By asserting her claim to an estate tail she defeated the effect of that will. The consequence would have been, if the equity was distinctly followed, an application of all the interests, she took, to the relief of the parties prejudiced by her election against the will. Instead of trusting that to the uncertainty of the annual occupation of the rents and profits she was entitled to for life, a value was put upon that interest by an agreement with the approbation of the Court; and that gross sum, the amount of all the benefits she took, was ordered to be secured for those in remainder. Satisfaction has therefore been made to the disappointed devisees; and Lord Darlington will eventually be entitled to his share of that fund, if his interest as

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a devisee should come into possession. The consequence of that election is, that her estate remaining entire, takes place with all its legal effects. Nothing therefore affects Mr. Pulteney's interest under the will. He stands as a stranger. It was not out of sight, that he took the interest of the mortgage and the reversion of the Bradford estate.

As residuary legatee Lord Darlington has no equity; for he takes that interest subject to all debts. If the personal estate is diminished by unforeseen debts arising, nothing is to be collected from the will, that can impose a condition in favour of the residuary legatee. *Ex vi termini* he is entitled only to what may remain after all debts discharged. This equity therefore cannot apply to a residuary legatee.

As to the lessees, it is clear, if they are evicted by any person claiming paramount to General Pulteney, they must upon that eviction have under the covenant in the leases satisfaction from his assets. I felt a strong inclination at first to hold, that Mr. Pulteney now possessing part of those assets, which undoubtedly would in the account be applied to their satisfaction, should not be permitted to disturb their possession; and that it would be [*562] *better to bind him to that extent: but I am afraid I cannot support that proposition; for if it is a plain and obvious case, that tenant in tail has made leases not warranted by the statute,† and the estate tail has descended, the issue in tail, though possessing large assets both real and personal, may eject the tenants: and there would be no equity to compel him to confirm the leases. He might at his pleasure assume that possession; and the only remedy for the lessees would be an action of covenant. The Court could not interfere. He might say, "it is my absolute will as owner of this estate to defeat the leases. Their satisfaction must be measured by damages: but I choose to enter into possession; *sic volo*." A court of equity cannot measure the damages that may be given upon an action of covenant. A court of equity will not say, he shall not take his legal possession. They have taken a legal security: they shall have full benefit of that, but can have no more. It would be an equity a good deal in the air to say, I will not permit the legal

† 32 Hen. VIII. c. 28.

effect of the instrument to obtain, you shall not recover, because you are the person to make good the loss. It is purely a legal question. I do not conceive therefore, that I was correct in my first idea, that the rules and principles of this Court would enable me to say, the lessees have a right to stop this proceeding to recover possession.

Then can they put the defendant to his election? Their right to put him to election is still more impracticable; for a person claiming merely as creditor of the testator cannot say here, that persons claiming under the will shall arrange their interests so as to enable him to recover his debt in a particular manner. Parties claiming to put a person to election must claim specific rights under the same will. But I am not quite confident of that; and I feel so much bias against my opinion, that I will grant the injunction: but I must take care in doing that to guard it so as not to make a precedent, that might lead to consequences inconvenient and pernicious to landlords, of which there are pregnant instances in another country, though happily we do not know them here. The case I allude to upon the Duke of Chandos's estate in Ireland is a case, that never happened in this country; and I hope never will. The landlord should have a security for the full amount of his rent. I must take care of the interest of the legal owner of the estate, if it goes into length; which I must withstand. The object of this Court is to take care, the estate shall suffer no deterioration. Therefore take the injunction with *liberty to move to dissolve it, if the cause is not [*563] set down for hearing by Michaelmas Term: then if I remain of the same opinion, it will be unfavourable to the lessees; but there will be opportunity immediately to apply to correct my error, if my opinion is erroneous. It will be more regular, if you undertake to bring on the cause by that time.

The *Solicitor-General* for the plaintiffs assented.

1797.
Nov. 15, 16 21, & 22
[3 Ves. 385]

[These causes came on for hearing as reported in 3 Ves. 384—387. The arguments were to the same effect as on the former occasion, and the LORD CHANCELLOR remained of the same opinion, observing in his judgment, that "The residue is only what

1797.
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remains after all the debts are paid, and if a particular demand of any person taking a benefit under the will subjects the personal estate to a debt, the cases have not reached so far as that the benefit of putting a party to election can ever go to a residuary legatee of the personal estate."

Lord Darlington's bill was accordingly dismissed, and the injunction obtained by the lessees was dissolved, but their bill was retained with liberty to them to bring an action to ascertain their damages on eviction.]

1795.
July 24.
Rolls Court.
ARDEN, M.R.
[673]

WRIGHT *v.* RUTTER.†

(2 Vesey, Jr. 673—677.)

Husband and wife by indenture assigned in trust for the husband personal property, bequeathed to the wife and in possession of the administrator; the husband by will gave the residue of his real and personal estates in trust for his wife for her separate use for life, remainder over; and died: upon the bill of the wife and her second husband, claiming against the deed, being put to her election, she elected to take under the will; and the bill was dismissed.

RICHARD GLOVER by his will gave the residue of his real and personal estate to Elizabeth Moulton, her heirs, executors and administrators, for ever; she paying thereout all his debts, legacies and funeral expenses: and he appointed her executrix. She renounced; and administration with the will annexed *was granted to Richard Glover. Elizabeth Moulton by her will gave to Anne and Olive Nash, their executors and administrators, the residue of the personal estate of Richard Glover, the testator, bequeathed and which at her death should remain due to her from his administrator. She died in 1772. In 1777 Olive Nash married Edward Knight; and in 1783, by indentures reciting, that there was justly due and owing from Edward Knight to John Rutter the sum of 300*l.* upon simple contract, and that the said John Rutter was desirous of having some better and ample security, it was witnessed, that in consideration of the said sum and for the better security of John Rutter and in consideration

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† *Roberts* v. *Cooper* (1891) 2 Ch. 335.

of ten shillings Edward Knight and his wife did grant, bargain, sell, assign, transfer and set over, to John Rutter, his executors, administrators and assigns, one moiety of two sums of 1,642*l.* and 270*l.* due from the estate of Henry Peyton deceased and his son to the estate of Glover, with all the arrear of interest, and also of and in all and every the clear residuum and remainder of the personal estate of the said Glover remaining due, and also of and in all and every other the monies and premises, matters and things, bequeathed by the said recited wills or either of them for the use and benefit of Olive Knight, and all the estate, right, title and interest, both at law and in equity of them, the said Edward Knight and Olive his wife, of, in or to, the same, every or any part thereof, to have, hold, receive, take and enjoy, the said moiety of the said monies and premises, matters and things, to John Rutter, his executors, administrators, and assigns, upon the trusts after expressed; and Edward and Olive Knight did appoint John Rutter, his executors, administrators and assigns, their true and lawful attorney irrevocable in their names or the name of the said John Rutter to demand, receive and sue for, the said monies and premises; and the trust was declared to be, that John Rutter, his executors, administrators or assigns, should retain the said sum of 300*l.* with interest and his costs and charges, and subject thereto stand possessed upon trust for Edward Knight, his executors, administrators and assigns, and upon no other trust whatsoever. In 1786 Edward Knight by his will gave to the said John Rutter all his real and personal estates not before disposed of, in trust to sell, and invest the produce in government securities, in trust for Olive Knight for her separate use for life, and after her decease for his brother and sister, nephews and niece, share and share alike; *and he [*675] appointed John Rutter executor. Edward Knight died in 1790. In 1792 his widow married Thomas Wright; and they filed the bill to have the deed of assignment delivered up to be cancelled, and praying that the plaintiffs might be declared entitled in the right of Olive to a moiety of the personal estate of Glover, the testator, as against John Rutter and all other persons claiming the same under the said assignment or the will of Edward Knight. The bill stated that Knight represented to his wife,

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that he was indebted to Rutter, and for securing that debt requested her to join; that the assignment was not to secure any sum due to Rutter; it being lately discovered by the plaintiffs, that no sum was due to him from Knight, but it was a contrivance to enable him to dispose of his wife's interest by will, or to prevent her from having the benefit thereof, in case she survived him. The bill farther charged, that it was contrary to the intent of the plaintiff Olive and a fraud upon her, and that she was not previously to the execution informed, that the personal representative of Edward Knight, in case he should die in her life, would by the said assignment acquire any right to such moiety; and that she would not have executed, in case she had been, apprised, that it would have such effect. The defendant Rutter by his answer and examination admitted, there was no debt due to him, and stated, that he understood the purpose of the assignment to be effectually to assign and secure to the family of Edward Knight the interest of his wife in the said property; with which intention he believed Olive to be acquainted; and being ignorant of business, and thinking he was only assisting the intention of the parties, he suffered it to appear upon the deed, that the said sum was so due.

Mr. Graham and *Mr. Harvey*, for the plaintiffs:

Burnett v. *Kinaston*, 2 Vern. 401; *Bates* v. *Dandy*, 2 Atk. 207. This is not strictly a chose in action. *Garforth* v. *Bradley*, 2 Ves. sen. 675, was like this a case of a residue of personal estate. The wife's joining can make no difference.

Mr. Richards and *Mr. King*, for the defendants:

As there is no proof of fraud, the question is only, whether her assignment jointly with her husband will prevent her claim. If the husband assigns either a chose in action or in equity for valuable consideration, the wife is bound. Where she has separate property, she is under the coercion of her husband: *but she may give it either to or from him. If she had consented in Court, this Court could not have prevented him from having it: then why may it not be done by act *in pais*, if without fraud or constraint. The cases cited are, where no assent of the wife appears.

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MASTER OF THE ROLLS:

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Suppose the naked point to be upon a free fair deed assigning her interest in the residue in the hands of an executor. It is now determined by the Court of King's Bench, that an action will not lie against the executor admitting assets in such a case; and one of the reasons is, that the husband would get it free from the condition, a Court of Equity imposes. It is very clear, that the wife's joining is nothing; therefore if this does not stand in the way, unless the administrator of Glover had joined, so as to have conveyed to the husband, which he might have done certainly, the question is, what sort of interest she had. It is not possible to suppose, that she was induced to join by the consideration represented; for after providing for this debt, she goes much farther, and gives sums specifically mentioned and far exceeding it. I will therefore take it to be this transaction: that by deed without any consideration except her will to give it to her husband they have assigned it to him. Then the single question is, whether that disposition of her property in the hands of a trustee for her, which her husband could not assign without valuable consideration, if he could with that, which I do not mean to decide, shall be permitted to devest her right. It is compared to the case of a married woman made a *feme sole* as to particular property. The clear distinction is, that in point of law and the consideration of this Court a married woman has no disposing power, though she has a disposing mind. As to any property she has, the law and this Court consider her so much under the coercion of her husband, that she cannot exercise any disposing power; with this exception, that though at law she is totally devoid of any property, any person may make her a *feme sole* as to particular property he gives her: but as to any other property, which the donor has not given to her sole and separate use, she is a person having no disposing power; and the husband cannot in any way act with regard to any property in a trustee for her, or dispose of it, without the intervention of this Court, as he may upon choses in action; for he may bring an action upon a bond to her. I *do not know, that this case has [*677] ever arisen. If this is permitted, the sole and separate examination of the wife is perfectly nugatory. What is the use of it? Therefore property circumstanced, as this is, is just like real

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property at law: she is a person, whose consent cannot be given but under examination apart from her husband and with full knowledge of her right; therefore when I was a Judge at law, I always did, and I suppose, the Judges of the Court of Common Pleas do, explain to the wife the consequence. If with full knowledge of that she does freely and voluntarily consent, the Court will permit the property to be acted upon, but not otherwise: I have known cases, where even then the Court has not done it: but we do it in general; and I rather think, if she persists, we cannot refuse. This is an attempt to make all that nugatory. Then if this had been the husband's deed only, without deciding, which I do not by any means admit, that he could even for a valuable consideration assign it, there is no doubt, his act alone could not convey it to Rutter; and her joining is of no effect. She was not made a *feme sole*. If Glover the donor had made her so, it would have been different. In that situation her husband prevails upon her without any consideration to join in making a present of this to him. His will makes no difference; for if the deed is good, he might have given it away the next day, and have totally deprived her of every thing; for if the deed was good, he was not bound to give her a life interest, though he has done so. It is a voluntary deed by the husband and wife. I do not know, how that absurd consideration came to be inserted: but it turns out to be nothing. Therefore this deed is absolutely void as against the wife; and I must consider it as if not executed. Then the property survived to her; and the question is, whether the deed ought not to be taken out of the way. The party is not to have the deed, out of which he claims any interest, without the Court's taking care, that it shall not be set up. I wish the administrator of Glover had been a party: but it is not worth while to let it stand over for that.

The plaintiffs electing to take under the will of Edward Knight, the bill was dismissed.

In *Rutter* v. *Maclean* (1799) 4 Ves. 531, the election here imposed was questioned by the assignees in bankruptcy of Thomas Wright, but the LORD CHANCELLOR (Lord LOUGHBOROUGH) held the election to be necessary and valid.

BALCHEN *v.* SCOTT.

(2 Vesey, Jr. 678—679.)

1795. *July* 25.

LOUGHBOROUGH, L.C.

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A co-executor, who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate, and sending it immediately to the acting executor.

TAPP and Whitmore were executors. Both proved the will; but the former, who had been in partnership with the testator, alone acted, and afterwards became insolvent. By the examination of Whitmore it appeared, that he received a letter by the post from a debtor to the estate inclosing a bill of exchange for 100*l.* on account of his debt; which bill he immediately sent to the acting executor. The Master held Whitmore liable in favour of the residuary legatee; upon which an exception was taken to the report.

Attorney-General, for the exception, cited *Churchill* v. *Hobson*, 1 P. Will. 241.

Mr. Graham and *Mr. King*, for the report:

The debtor was discharged the moment the bill reached Whitmore. His handing it over makes no more difference than if he had given it to his servant for payment. In the case cited the intention and understanding of the creditors was to continue Goodwyn in the management. That was an exception out of the general cases. The practice has been for the Court to look into the circumstances. This is not the case of a mere formal receipt. By handing it over to Tapp, Whitmore made himself answerable for Tapp's administration of the property.

LORD CHANCELLOR:

I must take the fact here from Whitmore's examination. The Master had no other ground before him. According to the fact I must hold it perfectly clear, that Tapp was the acting executor, and Whitmore was not. Though he proved the will, he never did any thing in the character of executor. Then it brings it to this; whether a stranger, a debtor to the estate, sending in a letter a bill inclosed to one named as executor, and who proved

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BALCHEN v. SCOTT.
[*679]

the will, but never acted, and his immediately transmitting that to the acting executor, shall be considered acting as executor. It is too harsh to say, he is liable, because he did not send the bill back and desire *the debtor to send it to the acting executor, but handed it over himself to Tapp, the acting executor, and the person trusted by the testator. It would be a most rigorous construction to hold, that writing a letter to him made him an acting executor.

Allow the exception.

1795.
July 27.
LOUGHBOROUGH, L.C.
[679]

IVY *v.* KEKEWICK.†

(2 Vesey, Jr. 679.)

Bill prayed that the defendant might state the particulars of his pedigree as heir and of the births, baptisms, marriages, deaths or burials: demurrer allowed.

THE bill stated, that the testator had after the execution of his will contracted for the purchase of an estate; which purchase was completed by his executor Kekewick, who conveyed to his son; and that they are, or one of them is in possession; that the plaintiff is heir *ex parte maternâ* and that there is no heir *ex parte paternâ*. The defendant Kekewick by his answer claimed as heir *ex parte paternâ*. The plaintiff by the amended bill prayed that the defendant might set forth, in what manner he is heir *ex parte paternâ* and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths or burials, of all the persons, who shall be therein named. To this part of the amended bill the defendant demurred.

LORD CHANCELLOR:

This is a fishing bill to know, how a man makes out his title as heir. He is to make it out: but he has no business to tell the plaintiff, how he is to make it out.

Allow the demurrer.

† *Bidder* v. *Bridges* (1885) 29 Ch. D. 29, 37; 54 L. J. Ch. 798.

WILSON *v.* LORD JOHN TOWNSHEND.*

(2 Vesey, Jr. 693—697.)

1795.
July 31.

LOUGHBOROUGH, L.C.

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Feme covert must elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail. Possession taken by her husband under that title does not preclude her election: but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit.

Tenant cannot set up a title against his landlord.

Party claiming under an instrument must claim under the whole.

Election applies to interests of married women, interests immediate, remote, contingent, of value or not of value, real or personal.

AUDREY, Dowager Viscountess Townshend, by her will dated July 17th, 1783, reciting, that she was seised to her and her heirs of a capital mansion-house called Balls, and also seised and possessed among others of the farms therein mentioned, being part of another estate belonging to her called Datchworth, annexed the said several farms thereby specified to her said mansion-house, park and lands, called Balls, in order that the same might accompany and go along therewith, and might be jointly subject to the several dispositions after mentioned concerning the same. The testatrix then devised the said farms, parcel of her said Datchworth estate, so annexed to her estate called Balls, and also the estate called Balls, to trustees and their heirs to the use of her grandson John Townshend, the defendant, and his issue male in strict settlement, with divers remainders over; and as to the residue of her Datchworth estate not so annexed to her estate called Balls and all other her estates in the county of Hertford, she gave and devised the same to the aforesaid trustees in trust to sell the same; and she directed, that the money produced by the sale together with the money produced by the sale of her house at Whitehall held under a lease from the crown, which she also directed to be sold, should be disposed of in manner following: that is to say, that her executors should in the first place set out and appropriate a sufficient part thereof for the purpose of answering and paying to her grand-daughter Anne, the wife of Richard Wilson, for and during the term of her natural life an

* *Re Lord Chesham, Cavendish* v. *Dacre* (1886) 31 Ch. D. 466; 55 L. J. Ch. 401.

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annuity or yearly rent-charge of 200*l.*, to be to her sole and separate use and in no manner subject to the control, debts or engagements, of her present or any after taken husband; and the residue of the money to arise from the aforesaid sales after the said appropriation, and after the death of Anne Wilson such part, as should have been so appropriated to answer her annuity, the testatrix devised to her grandson William Townshend, the only surviving son of her son Charles Townshend, his executors, administrators and assigns; and she appointed her trustees aforesaid executors.

[694] By a codicil dated April 27th, 1784, the testatrix declared, in order to avoid any possibility of mistake as to what part of her estate in the county of Hertford was comprised or intended to be by her comprised in the devise of the rest of her Datchworth estate, that the same consisted of the manor of Datchworth, and other premises therein described; and she revoked the bequest and direction made by the will concerning the application of the money to arise from the sale of the said residue of her Datchworth estate and her house at Whitehall subsequent to the appropriation of a sufficient part to answer the annuity of Anne Wilson; and instead of the unappropriated part in the first instance and the appropriated part after the death of Anne Wilson being paid to her grandson William Townshend, his executors, administrators and assigns, she directed the same to be laid out in government or real securities for her grandson William Townshend for life; and upon his death the principal to be equally divided among his children, and in case of no children to the defendant, her grandson John Townshend, his executors, administrators and assigns.

The testatrix died in 1788. The executors paid the annuity to Mrs. Wilson till the death of William Townshend in May, 1789; at which time they discontinued payment upon finding indentures of settlement of the 12th of June, 1738, under which a fine was levied of the manor of Datchworth and certain other premises in the county of Hertford, which were part of the premises directed by the will and codicil to be sold as the rest of the testatrix's Datchworth estate for raising a fund for paying the said annuity to Anne Wilson; the uses of which indentures and fine were to

Lord Lynne for life; remainder to the testatrix, then Lady Lynne, for life; remainder to trustees to preserve contingent remainders; remainder to Charles Townshend, second son of Lady Lynne and his issue in strict settlement: remainder over. William Townshend was the only son of Charles Townshend; and upon his death without issue male and without having barred the estate tail Mr. and Mrs. Wilson in her right, as the only other child of Charles Townshend, entered into possession and receipt of the rents and profits of the said manor and premises. The object of the bill was to establish the annuity. It appeared by the answer, that the estate devised by the testatrix as the residue of the Datchworth estate and all other her estates in the county of Hertford, together with the produce of the sale of the house at Whitehall, produced an annual income of 477*l.* 18*s.* 8*d.* and that the *part of the devised estate, that was comprised in the settlement produced a rent of 182*l.* capable of great improvement with a considerable quantity of timber to the value of 1,700*l.* The questions were, whether Mrs. Wilson was put to her election; and whether the possession taken under the settlement was an election.

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Mr. Hardinge, *Mr. Graham*, and *Mr. Fonblanque*, for the plaintiffs:

This gift is to a *feme covert* with notice of the coverture; and she is by the gift made a *feme sole:* in which respect she is severed from her husband. She is not considered as a person, over whom the marital right operates. The tacit condition is, that the legatee is to elect: here the condition is upon a *feme sole;* not upon her husband or herself as a wife. The act of a *feme covert* will not touch the right given to her on purpose that it may never be her's as a wife, but always as a *feme sole.* The entry by the husband therefore cannot bind her. The legacy is for maintenance upon an evident supposition, that her husband would not maintain her. She has a right to take what is given to her separate use. If she must elect, she is not precluded by her husband's taking possession *jure mariti.* The election must have been upon the remainder after the estate tail of William Townshend. The question was never raised, till the bill was filed

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in 1793; and she is now called on to elect, when the estate has devolved upon her. If she is bound to compensate, it is only to the extent that she would have been, if she and her brother had been called upon to elect. If he had elected against the will, she would have been entitled to her annuity. So she would, if he had suffered a recovery and the estate had been cast upon her. This is a devise to trustees to sell, not an immediate estate to her. Her husband had already as a purchaser acquired an interest. There is now a sufficient fund to satisfy the intention without putting her to election. *Streatfield* v. *Streatfield*, For. 176, went upon the supposition, that the will would be acceded to.

Attorney-General, Solicitor-General, Mr. Mansfield, and *Mr. Campbell*, for the defendants:

Lady Townshend had no doubt, that she was entitled to the Datchworth estate. Mrs. Wilson is bound either to bring that estate, which is her's, and is enjoyed in her right, into the [*696] general *fund or to give up her annuity. Though William Townshend was tenant in tail at the death of testatrix, it does not depend on the remoteness of the enjoyment: but if it is a present interest, though the enjoyment is future, it is capable of immediate value and disposition, and therefore is the subject of election: *Highway* v. *Banner*, 1 Bro. C. C. 514. Upon this doctrine, in case of a strict settlement only the first son would be bound; and it would apply even to an express condition. Her being married and the annuity being for her separate use make no difference. It is upon an implied condition, that the estate is to be enjoyed as directed. *Cowper* v. *Scott*, 3 P. Will. 123. It is not upon the ground of an election held out by the testator: but if they take advantage of his ignorance upon the subject, the answer is, that it is not the intention.

Reply:

It is impossible after *Highway* v. *Banner* to go upon the minuteness of the interest. This case affords a manifest and sensible distinction. The election is forced upon a married woman against a right, that she takes under the description of a *feme sole*, the testatrix having notice of her coverture. It is forced upon her

in another character, as a wife under the control of her husband. *Cowper* v. *Scott* was upon the head of satisfaction between parent and child.

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LORD CHANCELLOR:

There have been several orders, by which the Court has referred it to the Master to see, whether it would be for the benefit of the wife to take under or against the will. Here it is so very clear, the election must be against the will, that it is not worth a reference. The principle of these cases is very clear. The application is more frequent here: but it is recognized in courts of law every day. You cannot act, you cannot come forth to a Court of Justice, claiming in repugnant rights. Upon that it is, that a Court will not allow a tenant to set up a title against his landlord. A man may take a lease of his own estate: but no Court of Justice will permit him to set up his title against his landlord. When you claim under a deed, you must claim under the whole deed together: you cannot take one clause and desire the Court to shut their eyes against the rest. Suppose, in a will a legacy is given to you by one clause, by another an estate, of which you are in *possession, is given to another person: while you hold that, you shall not claim the legacy. It applies as Chief Justice DE GREY very properly applied it in *Lord Darlington* v. *Pulteney*, to interests of married women, interests immediate, remote, contingent, of value or not of value. You cannot dispute the ownership. It applies in the case of personal legacies. If a specific thing belonging to one of the legatees is by the will given to another person, the legatee cannot hold both. He must make himself competent to take the legacy by giving up that specific thing. Therefore the Court says there shall be an election; and gives an opportunity of electing; and will not easily hold the election concluded. But if the party is under restraint, and cannot accomplish that, it is the misfortune of the party: but the consequence is, that while he continues in that situation, his claim must be barred; for it is directly contrary to the intention and distribution of the property. That is in point of law implied. As to this bequest to Mrs. Wilson for her separate use, the Court cannot execute a will by parcels: it must be totally; or with regard to the

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party, by whose means it fails, the Court can do nothing for that party. I must perform the will. Therefore I do not see a distinction, upon which I can break in upon the rule in any degree. I can do nothing but dismiss the bill without costs; for she has manifestly a much better interest, than the testatrix intended.

1793. *Nov.* 13,15,18. *Dec.* 5, 6. 1794. *Jan.* 26. 1795. *Aug.* 5.
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(2 Vesey Jr. 698—716.)

Under marriage articles 15,000*l.* was vested in trustees on trust together with 5,000*l.* covenanted by the husband to be paid, to be laid out in land, to be settled upon the husband for life; remainder to the wife for life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations and provisions, as the husband and wife or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.* and directing them to deliver the said stock, &c., to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust fund, but that the said fund with its increase should be taken out of his personal estate, gave 10,000*l.* part of the trust fund, in trust to be laid out in land to be conveyed to one daughter for life for her separate use; remainder to her children in tail; remainder to the other daughter in fee; for whom he also appointed the residue of the fund, but revoked that byc odicil, reciting a portion given on her marriage. Held, 1st, that grandchildren are not objects of the power, but the excess only would be void: 2ndly, the fund with its increase was invested in the purchase: 3rdly, there was no appointment of the estate or money due on the covenant: 4thly, the remainders in default of appointment are vested, subject to be devested by appointment, and will take effect as to what is ill appointed or unappointed: 5thly, the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied.

Husband is not to account for the income of his wife's separate estate, which she permitted him to receive.

Father having power to appoint among children and purchasing the share of one cannot by appointment entitle himself to more than the share of that child in default of appointment.

BY a settlement previous to the marriage of Pinckney Wilkinson and Mary Thurlow in 1735, 10,000*l.* part of the fortune of

Mary Thurlow, and 5,000*l.* paid by Mr. Wilkinson, were vested in trustees upon trust, together with 5,000*l.*, covenanted by Mr. Wilkinson to be paid within ten years, or within one year after his death, upon the same trusts, to be laid out in the purchase of real estates to be settled to the use of Mr. Wilkinson for life without impeachment of waste; remainder to the use of Mary Thurlow for life in bar of dower; remainder to the use of such child and children of the marriage in such shares and proportions and for such estates and subject to such powers, limitations, and provisions, as Mr. Wilkinson should by deed or will appoint; and for want of such appointment, to such uses as Mary Thurlow should appoint; in default of appointment, to the use of the children in tail; and in default of issue to the use of Mr. Wilkinson in fee; with power to the trustees of these sums to change the funds, till the purchase should be made. By deed of the same date Mary Thurlow conveyed all her real estate and assigned all her personal property except the said sum of 10,000*l.* to trustees to her sole and separate use. The only surviving children by this marriage were Mary and Anne Wilkinson. Mary Wilkinson married Mr. Smith without the consent of her parents; and no portion was given upon that marriage. The securities, in which the sum of 15,000*l.* had been invested under the settlement, had been frequently changed by the trustees acting under the direction of Mr. Wilkinson. In August, 1752, Mr. Wilkinson purchased a freehold estate at Burnham *in the [*699] county of Norfolk for the sum of 16,300*l.* Part of the purchase money was applied in the redemption of a mortgage upon the estate: the residue was paid into the Court of Chancery; and a conveyance was directed to Mark Close, and his heirs, in trust to convey to such uses as Mr. Wilkinson, his executors, &c. should appoint; and until such conveyance to stand seised in trust for Wilkinson and his heirs.

Mr. Wilkinson by his will dated the 1st of August, 1768, and duly attested to pass real estate, reciting the trust as to the sum of 20,000*l.* to be laid out in real estates under his marriage settlement, that he had received 10,000*l.* out of his wife's fortune, that he had purchased the estate at Burnham in the county of Norfolk, but had not conveyed it to the uses declared

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by the settlement, and that it was not his intention, that the said purchase should be considered as an investment of the trust fund of 20,000*l.*, but that the sum of 20,000*l.* and a surplus of 861*l.* 14*s.* 9*d.* arising by the sale of the stocks, in which 15,000*l.* part of the said trust fund, had been invested, should be taken out of his personal estate in lieu of such trust money, and applied as after mentioned, gave and devised to the surviving trustee in the marriage settlement 10,000*l.* part of the said sum of 20,861*l.* 14*s.* 9*d.*, in trust to lay out the same in real estates, to be conveyed to the use of his daughter Mary during her life, for her sole and separate use; remainder to the use of trustees to preserve contingent remainders; remainder to the use of all and every the child and children of his daughter Mary, to take as tenants in common, and the heirs of the body of all and every such child and children; and for default of all such issue, remainder to his daughter Anne, her heirs and assigns for ever. The residue of the said sum the testator appointed to his daughter Anne. He also gave her a legacy of 30,000*l.*; and he devised all his estates freehold and copyhold to his daughter Anne and her issue in strict settlement; remainder to the children of his daughter Mary and their issue: remainder over in fee. He also gave his personal estate to his daughter Anne for life with limitations over.

In 1771 Mrs. Wilkinson died. In July, 1771, Anne Wilkinson married Thomas Pitt, afterwards Lord Camelford; upon which marriage Mr. Wilkinson gave her a portion of 40,000*l.* By a codicil dated the 1st of August, 1771, Mr. Wilkinson reciting the will, the marriage of his daughter Anne and the portion given to her, revoked the legacy of 30,000*l.* given by the will to his said daughter. By another codicil dated the 25th of December, [*700] 1781, *he devised other estates, purchased after the execution of the will and the former codicil, to the same uses as those declared by the will as to the Norfolk estate; and he directed, that his daughters and all persons claiming under them should do every necessary act for settling some copyhold estates, which had belonged to their mother, in the same manner; and he revoked all benefit given by his will to such persons, as should refuse or neglect to do such acts within six months after his decease; and

he gave, not only all such benefit, but whatever such person or persons might become entitled to as his heir at law or otherwise under him, to the same uses, as far as the law would permit, to which he had given his Norfolk estates. He gave his navy bills, amounting to about 7,000*l.* in trust to accumulate for the children of his daughter Anne in such shares as Thomas and Anne should appoint; and he gave his personal estate, given to his daughter Anne for life, to Thomas Pitt, if he should survive his wife; remainder over upon his decease or marriage as in the will.

The testator died in 1784. A bill was filed on the part of the infant son of Lord and Lady Camelford to have the trusts of the will carried into execution. In that cause some evidence was given of a purchase by the testator of the real estates of his wife, settled upon her marriage to her sole and separate use. By the decree made in 1786 by the MASTER OF THE ROLLS, sitting for the Lord Chancellor, the will and the second codicil were established; and it was declared, that no part of the trust fund had been invested in the purchase of real estates; that the portion given to Lady Camelford upon her marriage was to be considered as a satisfaction of her share of the trust fund of 20,861*l.* 14*s.* 9*d.* and the legacy of 30,000*l.* given to her by the will; that so much of the appointment of the trust fund, as affected to give limitations to the children of the defendant Mary Smith was void; but to effectuate the general intention of the testator the appointment in favour of the defendant Mary Smith and her children was to be considered as vesting an estate tail in the lands directed to be purchased with that share in Mary Smith, with remainder to Lady Camelford in fee. The decree directed an inquiry, whether the testator possessed himself of any part of the real or personal estates of Mary Wilkinson; and declared, that whatsoever he should so have received is to be considered as a debt due from him, to be answered out of his personal estate. It was also directed, that the share of the trust fund appointed in favour of *Mary Smith should be laid out in land, and settled to the use of trustees, in trust for her and the heirs of her body; the rents and profits to be paid to her separate use; remainder to Lady Camelford, her heirs and assigns, for ever. [*701]

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After this decree two bills of review were filed: one by Mrs. Smith, the other by the plaintiff in the original cause; who upon the death of his father succeeded to the title. The object of the former was to reverse that part of the decree, that declared, that no part of the trust fund had been invested in the purchase of real estates, and to have it declared, that the said fund was invested in the purchase of the estate at Burnham in the county of Norfolk; and that the said estate was subject to the uses and trusts of the settlement of 1735. Upon the evidence introduced by this bill of review it appeared, that upon the 5th of June, 1753, Mr. and Mrs. Wilkinson executed a direction to the trustees of the fund, declaring, that having resolved, that the India stock, annuities, &c. standing in the names of the trustees in trust for them should be invested in the purchase of the estate at Burnham in Norfolk, they desired the trustees to deliver to Mr. Wilkinson the said stock, annuities, &c. "at the price they were at upon the 13th of August last." The stock was transferred accordingly, and a receipt given by Mr. Wilkinson dated the 8th of June, 1753. A deed was drawn declaring this estate to be subject to the trusts of the marriage settlement: but that deed was not executed.

The object of the bill of review filed by Lord Camelford was, that so much of the decree, as declared, that the appointment in favour of Mrs. Smith was to be considered as vesting an estate tail in her in the lands directed to be purchased with that share, should with the consequential directions be reversed; and that the limitation should be to Mrs. Smith for life, with either an immediate remainder to Lady Camelford in fee, or with remainder, as to one moiety to Mrs. Smith in tail, remainder to Lady Camelford in fee; as to the other moiety, to Lady Camelford in fee, or in tail, with remainder to her in fee. The former relief was prayed upon the supposition, that by the failure of the appointment to the children of Mrs. Smith, the remainder in fee given to Lady Camelford would be accelerated: the latter was upon the ground, that so much of the interest, as was ill appointed should go as in default of appointment. The bill also prayed, that Mr. Wilkinson might be declared a purchaser of the [*702] *real estates settled to the separate use of his wife, or entitled to

all the rents and profits of her separate estate received by him.

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Attorney-General, Mr. Hardinge, Mr. Graham, Mr. Stanley, and *Mr. Hood,* for Lord and Lady Camelford. * * *

Mr. Campbell for the children of Mrs. Smith.

Attorney-General in reply.

Note. (2 Ves. Junr. 711 n.)—Upon the 26th of January, 1795, these causes were argued upon the point of election, raised for the children of Mrs. Smith against Lady Camelford; and *Whistler* v. *Webster,* 2 R. R. 260, was cited. As the subject has been so frequently and so lately discussed, the arguments are omitted.

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LORD CHANCELLOR (after stating the case):

As to the objects of the power of appointment Lord KENYON was of opinion, in which I entirely concur, though I thought the question for a long time liable to doubt, that it could not extend to the children of the children; and therefore that all inserted for them was beyond the limits of the power, and therefore void; as it could convey no benefit to them: but it being apparently the intention, that not Mrs. Smith alone should be personally benefited for her own life, but that an estate should pass, by which her children, the grand-children of the testator, should be benefited, he held, that it should be executed *cy pres,* and should take effect by giving her an estate tail; and under the circumstances, and if the necessity of the case obliged the Court to consider how to dispose of this strange execution of the power, I should feel myself very much inclined to adopt the idea he pursued; thinking, that in these questions, where the person, in whom the power is vested, has not executed it properly, has affected to do more than he was empowered to do, and all, that is done, cannot be carried into effect, there is but one possible alternative; either to hold that there is no appointment, or to execute the good part of the intention as far as it can possibly be

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carried. The general *current of authorities has been very favourable to support the execution of the power, as far as it can be supported, and to reform all that is done irregularly, as far as possible. There are many authorities for that, to which I do not mean now to refer, because the opinion, I shall deliver, takes rather a different direction, though in substance coming to the same point as Lord KENYON'S. A parent distributing among children is exercising a judgment. Here it would be a very harsh construction to hold, that Mrs. Smith should take only for life; that, the children not coming within the scope of the power, no more should go to her of that, which was manifestly intended for her and her family. We always refer to what he would have done, if well advised and informed what he could not do. It is impossible, that he meant to cut her down to that narrow interest, which alone, as he has executed his power, she could take. No harm is done, if it is considered as no appointment; for then I have recourse to the marriage settlement, and am executing an instrument undoubtedly made according to the intention. The facts in this case upon the evidence introduced by the bill of review are, that after the execution of this settlement in 1735, Mr. Wilkinson being a man of business, and understanding money transactions, though the fund was put in the names of trustees, yet the trustees, acting under his direction, had managed the funds, had shifted them sometimes into one stock, sometimes into another, sometimes vesting them in lottery tickets, which he took out, and placed the value in a banker's shop. He had the management and the profitable arrangement of the money up to the year 1752, when he became a purchaser of an estate in this Court. In 1753 he had come to a positive decision to sell this estate to the trust; and the manner, in which it is expressed, leaves no doubt, not only that it was a floating purpose, that might be carried into execution in part or in the whole, or dropped entirely, but that it was fixed; for as in the terms of the marriage settlement the trustees were directed to be governed by the appointment and approbation of Mr. and Mrs. Wilkinson, they executed a direction to the trustees in plain, distinct and definitive terms, reciting their resolution to invest the stock and annuities in the purchase of the estate at

Burnham in Norfolk, and directing them to deliver the said stock and annuities to Mr. Wilkinson. How to deliver them? "At the price they were at upon the 13th of August last." It was not therefore a mere accommodation to him; for the terms would not apply to such a *transaction: but if the intention was to invest the trust fund in that purchase, it is a perfectly proper intention to take the funds at the price they were at upon the day the estate was bought. They had a right to exercise their pleasure, that it should be so vested. The stock was accordingly transferred and a receipt given; and in execution of this purpose a deed was drawn subjecting the estate to the trusts of the marriage settlement. That deed remained unexecuted. The declaration therefore in the will, that he had not vested the trust fund in the purchase of an estate, is not true. It may be forgetfulness or mistake: but it was clearly not true; for on the 8th of June, 1753, when the trust fund passed from the trustees, according to this evidence they declare an actual investment. From that day the trustee Close stood seised to the uses and trusts declared by the settlement of 1735. That settlement had paid the price of the estate. The equitable interest of that estate became then limited, whatever the estate at law was, in such manner as an estate purchased by these trustees and conveyed by the trustees themselves would have been. No other uses could have been appointed by Mr. Wilkinson but such as were consistent with the investment of the trust fund. Therefore it is the common case, where an estate is purchased with the money of A. but no uses are declared: in equity it belongs to the owner of the money. It was invested with his consent and expressly by his order. The consequence is, the appointment in the will of Mr. Wilkinson cannot be supported as an appointment of the estate. He declared not only no uses of the estate purchased, but in hostility and opposition to an appointment of the uses of that estate. The consequence is evident that it cannot operate upon the land. Then to whom does it belong? To those, who in default of appointment had by the express terms of the settlement an estate tail given to them. The two daughters became upon the 8th of June entitled in equity to an estate tail in this land, subject to be devested by the execution of the power, or the

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existence of other children, who would take equal shares with them. As to Mrs. Smith, no circumstance has happened to vary the right the law gives to her. As to Lady Camelford, a very material circumstance has taken place, which has put her, as at his death totally in his power; viz. the portion of 40,000*l.* given to her upon her marriage, when her interest under the appointment was contingent and uncertain in respect of the possibility of the existence of other children. Upon the whole train of authorities upon the head of satisfaction he has satisfied all the [*714] interest, that she could as a *creditor set up in opposition to any act of his will with regard to her provision under the marriage settlement. By the codicil Mr. Wilkinson plainly understands it so. The consequence is obvious. At his death his will as to Mrs. Smith was no appointment of the land. As to Lady Camelford it operated absolutely as a bar to any claim, that could be set up by her as entitled as a creditor to any equitable interest; for he by satisfying all she is entitled to stands in her place. Therefore he very justly and properly revoked all, that respected her. By the terms of the settlement the reversion in fee of the estates to be purchased with the trust fund is settled in Mr. Wilkinson. Therefore the reversion in fee will go as the general residue of his real estate. It will operate fully *quoad* the reversion: but as to what is subject to appointment it cannot operate against Mrs. Smith, who had no satisfaction, unless so far as a complete and well executed appointment will take it from her. Even a well executed appointment could not take from her one moiety; for though he could entitle himself to all Lady Camelford could claim, it could be only to that she could claim absolutely against the other daughter. He could not make an appointment in truth beneficial to himself: but in truth he has not. Whether I take it as no appointment, or as an appointment so far as he has made any good appointment, the effect is the same. The estate to Mrs. Smith for life is so far good. Then all after her estate for life, intermediate between that and the reversion in fee expectant upon the estate tail in his daughters, is to be struck out as no appointment. The consequence is, that intermediate interest is to go, as if no appointment was made, according to my decree in *Bristow* v. *Warde*,

2 R. R. 235. Then all the intermediate interest prior to the reversion in fee expectant upon the estate tail in them both is unappointed; and the two daughters would take it equally. Lady Camelford is disposed of by the interest given to her upon her marriage; but nothing was given to Mrs. Smith; and the consequence is she takes an estate tail. Therefore there is only this difference; that under the original settlement she would have an estate tail at once, and in this way an estate for life; remainder to herself in tail; which is the same; for her life estate is moulded into it. So far as to the land. I am likewise of the same opinion as to the money; that in the same view of the case the money not being laid out in performance of his covenant must be laid out to the same uses. Then it occurs, that Mr. Wilkinson has made an inequality as to the fund, which was increased by 861*l.* 14*s.* 9*d.* That, I am clear, he *could not do. [*715] That fund of 15,000*l.* in the name of trustees having produced that sum, and being with its increase vested in land, the benefit of the increase is gone into the land, and the whole land is acquired to the trust. It is manifest, Mrs. Smith is entitled to a moiety of the land. Then what remains is only an account of so much, as is due from Mr. Wilkinson upon his covenant to lay out 5,000*l.* I cannot allow him to take from the land in consequence of his saying, he gives Mrs. Smith 10,000*l.* and the other daughter the remainder of it: but the intermediate part of the interest will go equally; and Mrs. Smith is entitled to claim, and the other is not. Very considerable doubts have occurred to me from time to time. It is of very little moment to consider, whether the interest Mrs. Smith takes is in total default of appointment or coupled with an appointment *pro tanto;* for her interest either way as to the share and *quantum* of interest is precisely the same.

Upon the bill of review filed by Mrs. Smith reverse so much of the decree, as declares, that no part of the trust fund had been invested in real estate; and declare, that the trust fund and the cash of 861*l.* 14*s.* 9*d.* were invested in the purchase of the estate at Burnham in Norfolk by the joint direction of Mr. and Mrs. Wilkinson upon the 8th of June, 1753; and the estate thereby became subject in equity to the uses and trusts of the

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settlement of 1735; and declare the plaintiff Mrs. Smith entitled in equity to one moiety of the estate as tenant in tail. Declare the trusts accordingly. As to the other moiety, together with the reversion expectant upon the estate tail of Mrs. Smith, declare the trustee seised upon such trusts, as are declared by the decree as to the real estate of Mr. Wilkinson. Declare, that one moiety of what shall be found due upon the account is to be laid out in land to be settled to the same uses. I shall direct an inquiry as to the expense of the purchase; for the sum is not precisely ascertained. In my opinion Mr. Wilkinson is entitled to charge 16,500*l.* viz. 16,300*l.* the price of the estate, and 200*l.* the expenses. He would have credit in purchasing an estate for the necessary expenses of making the purchase for the benefit of the trust. Upon the bill of review upon the part of Lord Camelford, if necessary, I will add a direction not to charge Mr. Wilkinson with any part of the income of his wife's estate received by him: but I think it not necessary. The decree certainly only meant an account of principal received by him. I do not [*716] think, under the words the Master *would charge him with rents and profits. In every view he is entitled. Though the property was settled to her separate use, yet if she permitted him to spend the income, he is not accountable: next he is her personal representative. The prayer, that he may be declared a purchaser of her separate estate, is quite impossible. Affirm the decree in all other respects. I have not pursued that part of the decree giving the rents, &c. to the separate use of Mrs. Smith; for in fact she takes in default of appointment.

FELLS *v.* READ.

(3 Vesey, 70—73.)

1796.
March 7.

LOUGHBOROUGH, L.C.

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The Court will decree a specific chattel to be delivered up without measuring the value, where from its nature there can be no compensation by damages. In this instance the defendant retained possession after the expiration of a limited time, for which he had received it upon a special trust and an express engagement to restore; and an action, which had been brought, was rendered ineffectual by the release of two of the owners, combining with the defendant.

THE plaintiffs were members of a club, called "The Past Overseers of St. Margaret's Parish, Westminster," which consisted of persons, who had served the office of overseer of the poor of that parish. This society had been for a long period in possession of a silver tobacco-box inclosed in two large silver cases, all which were adorned with several engravings of public transactions and heads of distinguished persons. The date of the box did not appear in the cause: but the ornaments, which had been added by different overseers during the time the box and cases remained in their custody, began in the year 1713. This box and the cases were always kept by the overseer for the time being; who upon coming into office received them from the churchwarden with a particular charge, in which he was enjoined, under a penalty, to produce them at all meetings of the society, and to deliver them up on going out of office to the senior churchwarden, to be by him delivered to the succeeding overseer. They were delivered in the usual form to the defendant Read, on his coming into office as overseer. On going out of office he refused to deliver them up, unless the vestry would pass his accounts; in which they had refused to allow him certain payments. Upon this a meeting was called; and it was resolved by those members, who attended, that legal steps should be taken; and after some negotiation an action was brought; and Read was arrested. Hanley and Byfield, two of the members, in whose name the action was brought, executed a release to Read; who *delivered [*71] the box and cases to Hanley. An application was made to Mr. Justice Buller at chambers to set aside the release: but that application failed. The bill was then filed against Read, Hanley,

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and Byfield, to have the box and cases delivered up. They were ordered to be placed in the custody of Master Leeds.

It was proved by Carteret, that the box and cases were delivered to Read under the usual injunctions and conditions; to which he expressly consented. The defendants, Hanley and Byfield insisted, that the action was commenced without their authority. They did not attend the meeting: but it was regularly called.

Mr. Mansfield and *Mr. Cox*, for the plaintiffs, cited *The Duke of Somerset* v. *Cookson*, 3 P. Wms. 389, as having established the jurisdiction, where the thing, of which the delivery is sought, is of such a sort, that damages can be no compensation.

Attorney-General, for the defendants:

Except that case and *Pusey* v. *Pusey*, 1 Vern. 273, in which the chattel had a connection with the tenure of the land, there is no case like this. The Court will order title-deeds and heir-looms to be delivered up, and will not permit valuable things to be defaced: but except in those cases there is no instance of a decree specifically to deliver up a specific chattel. If from a complication of circumstances they cannot succeed at law by stress of damages to compel delivery, I do not say, this Court will not interfere. There was a special property in the person, to whom this box was to be delivered, that would have supported an action; or they might have expelled Hanley and Byfield, and have gone on at law.

LORD CHANCELLOR:

I am sorry this cause has come into this Court: but the regret I feel is no other than that, one always feels, that litigation and expense should have been occasioned by the peevishness and obstinacy of the parties. The value I cannot measure. The Pusey horn, the Patera of the Duke of Somerset, were things of that sort of value, that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people, who have not those feelings. In all cases, where the object of the suit is not liable to a compensation by damages, it would be strange, if the law of this country did not afford any remedy. It

would be great injustice, if an individual cannot *have his property without being liable to the estimate of people, who have not his feelings upon it. But this has very particular circumstances: for if no such cases as those cited had occurred, if this had come here originally, it is impossible, that I should not have permitted the suit to stand. In the case of the Pusey horn in Vernon it does not appear, how the defendant got it. In the case of the Duke of Somerset the Patera was in the possession of a goldsmith, who bought it in the way of trade with notice of the claim of the Duke of Somerset. But in this case the possession is by a qualified title. It was delivered upon an express trust to keep it and produce it at the meetings of the club, and at the expiration of his office to deliver it over to the senior church-warden, in order that he might give it to the next overseer. He accepts it upon that condition. The witness Carteret states his express assent to the conditions. Had he then any right to retain this possession against the terms, upon which it was delivered to him? He was a depository upon an express trust; and he does not perform the trust. Upon the common ground of equity there was a right in the plaintiffs to have called upon him, in the first place during the term to have used it according to the trust. That would be a small subject of a suit in Equity: but if he had not produced it at the meeting, I must have compelled it; so, if he retains it after the expiration of the term. I must compel him to use it according to the trust. There was a legal remedy; and I think, it was done very wisely not to begin in Equity. There was another remedy, which did not occur to them. Upon the terms of Carteret's evidence the person, to whom Read was bound at the time to deliver it, might have been plaintiff in *assumpsit*. The conduct of these defendants is perfectly groundless: the idea, that by keeping possession of this ornament he would compel the vestry to allow his accounts. As to Hanley and Byfield, it is not necessary for me to determine it, but I incline to think, they would be bound to let the others make use of their names: but an indemnity as to the costs was the utmost they could have been entitled to. It is unfortunate, that the application made to the Court of Law did not succeed to set aside the release. I am then to judge of the conduct of the parties, not with regard to the

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ground of the decree, but upon the nature of the possession coupled with a trust. There was a proper ground as much as in any case. Where the right is not to use the thing as his own, but coupled with a trust to deliver it at a certain time, there is a clear jurisdiction upon the ordinary Equity to *compel the execution of the trust by the delivery of the thing at the time. But the conduct was extremely bad in Read; and not better in those, who conspired with him to frustrate the purpose of the trust and act contrary to it.

[*73]

Declare the plaintiffs entitled to the possession of this box. Let them receive it from the Master's office. Let all the defendants pay the costs; and let the defendant Read pay the costs at law.

1796.
March 15.
LOUGHBOROUGH, L.C.
[75]

FRANCO *v.* FRANCO.

(3 Vesey, 75—77.)

Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name. Demurrer, because the *cestuis que trust* were not parties, overruled with costs.

THE bill stated the following case. Jacob De Moses Franco by his will gave to his son Raphael 1,000*l.* in trust for Jacob, son of Raphael, and as many other sums of 500*l.* each, as he should have other children at the testator's decease except Jacob, to be paid to them respectively at the age of twenty-five or marriage, with benefit of survivorship in case of the death of any before the time of payment. The testator appointed his said son Raphael and his grandson Jacob, son of his eldest son Moses, executors, and in case of the death of either of them he appointed Francis Franco, the plaintiff, to be one of his executors in the place of him dying. At the death of the testator Raphael had ten children. The executors invested 5,500*l.* in 5 per cent. Bank Annuities in their joint names upon the trusts of the will for the *children of Raphael. Both the executors died: Jacob in 1782: Raphael in 1784. Raphael appointed the plaintiff Francis Franco,

[*76]

the defendant Jacob Franco, and two other persons, his executors. All the remainder of the fund was transferred into the names of the plaintiff and defendant upon the trust of the will of Jacob De Moses Franco; of which will the plaintiff upon the death of the surviving executor obtained probate. Seven of the children of Raphael having attained the age of twenty-five, their shares were transferred to them. In September, 1793, 3,000*l.* 5 per cent. Bank Annuities remained for the three remaining children, who had not attained the age of twenty-five. At that time the defendant prevailed upon the plaintiff to permit the fund to be transferred from their joint names into the name of the defendant only; in order that he might sell the same; assuring him, it was only for a temporary accommodation, and he would very soon replace it; and he also proposed for absolutely securing the repayment, to surrender a copyhold, and to procure the plaintiff to be admitted, and also to convey other estates; upon which the transfer was made; and the defendant sold the stock, received the produce, and never replaced it.

The bill prayed a discovery and account; that the defendant should be decreed to replace the fund, or to surrender the copyhold estate, and that the plaintiff might sell the same, and that the defendant should be decreed to make good the deficiency.

The defendant demurred on the ground, that the three children of Raphael, the *cestuis que trust*, were not parties.

For the demurrer:

The rule, that all persons interested must be parties, is invariable, except in the case of creditors and legatees; who by particular indulgence are permitted to go on before the Master. These children have the very same equity as the trustees. They might file a bill for the same purpose, and pray the same specific relief. The rule is, that the Court will not entertain a suit on behalf of a trustee without having the *cestui que trust* before the Court. *Hanne* v. *Stevens*, 1 Vern. 110.

LORD CHANCELLOR:

That was a suit for the execution of the trust. This is no bill

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[*77]

for execution of the trust. Whatever demand the *cestuis que trust* would have, they could never found *themselves upon the case the present plaintiff makes against the defendant. The demurrer ought to be over-ruled, and with costs; and I cannot help marking in strong terms my disapprobation of such a demurrer; which can be put in only for delay, and to cover a person guilty of a breach of trust, and to defer the time, at which he ought to answer.

1796.
April 14 *and* 15.
LOUGHBOROUGH, L.C.
[89]

STACKPOLE *v.* BEAUMONT.

(3 Vesey, 89—98.)

Condition in restraint of marriage under twenty-one without consent of trustees established both as to a rent-charge out of real estate and a personal legacy.

Testator devised his real estates to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry (if under twenty-one, with consent of trustees), for their joint lives and that of the survivor, with similar remainders. He also gave a rent-charge limited in the same manner to the second, her husband and issue male; and gave a similar rent-charge to the youngest, until she shall marry (under and with the restriction above mentioned), or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage he gave the youngest a legacy of 10,000*l.*, payable, 5,000*l.* upon her marriage (with such consent as aforesaid), and 5,000*l.* two years after. Upon her marriage without consent the condition being established against the husband does not affect her estate for life in the rent-charge.

SIR THOMAS BLACKETT devised several real estates in the counties of Northumberland and Durham to John Erasmus Blackett and Thomas Cotton and the survivor and his heirs, upon trust, to the use and behoof of his nephew William Bosville for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of such one of the sons of William Bosville as he should appoint, and of the heirs male of the body of such son; and for default of appointment, or of such issue of such son, then to the use of the 1st, 2nd, 3rd, 4th, and all and every other son and sons

of William Bosville and the heirs male of their bodies successively; and for default of such issue, then to the use of Thomas Richard Beaumont and Diana his wife, "(one of my natural daughters)," for and during their joint natural lives and the life of the survivor without impeachment of waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor, then to the use of such one son of the body of his said daughter Diana, as the survivor of her and Thomas Richard Beaumont should appoint, and of the heirs male of the body of such son; and for default of such appointment, or from and immediately after the decease of such son without issue male of his body, or in case any such shall be, who lives to attain twenty-one, and shall afterwards depart this life without leaving any son or sons of his body, or such son or sons shall also attain twenty-one, and afterwards depart this life without leaving any issue male, then to the use of the 1st, 2nd, 3rd, and every other son and sons of the body of his said daughter Diana by her present or any future husband successively, and of the several and respective heirs male of their bodies; and for default of such issue, or in case any such shall attain twenty-one, and afterwards die without leaving any son or sons, or such son or sons should die after twenty-one, without leaving issue male, then to the use of *William Lee and Sophia his wife "(another [*90] of my natural daughters)," for and during their joint lives and the life of the survivor without impeachment of waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor of William and Sophia Lee, to the use of all and every the son and sons of the body of his said daughter Sophia, by her present or any future husband, with like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations, as aforesaid in relation to the said Thomas Richard Beaumont and Diana his wife; and for default of such issue, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty one, without leaving issue male, then to the use of Louisa Wentworth "(the other of my natural daughters) or such person, as she shall first intermarry with, if any (if before she attain the

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age of twenty-one, by and with the consent and approbation of the said John Erasmus Blackett and Thomas Cotton, or the survivor, and his heirs; and which person shall also previously make a competent settlement upon her, my said daughter Louisa, by deed or deeds in writing, to the like approbation of the said John Erasmus Blackett and Thomas Cotton,) for and during their joint natural lives, or the life of the survivor of them, without impeachment of waste; and from and after the determination of that estate, then to the use of the said John Erasmus Blackett and Thomas Cotton and the survivor of them, and his heirs, for and during the life of my said daughter Louisa, or any such person as she shall so first marry, if any, and the life of the longer liver of them, upon trust, to preserve contingent remainders, and for that purpose to make entries or bring actions as occasion may require; but nevertheless to permit and suffer her, my said daughter, or such person as she shall so first marry, if any, and the survivor of them, to receive and take the rents, issues and profits, for her, their, or his, own use and benefit;" and from and immediately after the decease of the survivor of his said daughter, and of such person as she should so first marry, if any, then to the use of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations as aforesaid, in *relation as aforesaid; and for default of such issue of the body of his said daughter Louisa, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, then to the use of Sir John Sinclair, for life without impeachment of waste; remainder to such one of his sons by his present wife and for such estates as he shall appoint; in default of appointment, to his eldest son in fee; and as to all other his real estates, he devised them to the same trustees, to the use of Thomas Richard Beaumont and Diana his wife, and of the son and sons of his said daughter Diana and the heirs male of such son and sons, and of William Lee and Sophia his wife, and the son and sons of his said daughter Sophia and the heirs male

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of such son and sons, "and my said daughter Louisa, and such person as she may so marry, if any, as aforesaid, and of the son and sons of my said daughter Louisa and the heirs male of the body of such son and sons, and of the said Sir John Sinclair, and the son or sons of the said Sir John Sinclair by his said now wife, severally, respectively and successively" upon such trusts, &c. as before declared concerning the estates before devised.

The testator then charged all his real estates in Northumberland and Durham, except those devised to his nephew Bosville, with two rent-charges; and gave to John Cockshutt and his heirs one annuity or rent-charge of 3,000*l.* upon trust for the use and behoof of William Lee and Sophia his wife, for and during the term of the joint natural lives of the said William Lee and Sophia his wife, and the life of the survivor; remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the survivor, to the use of all or any one or more of the son and sons of the body of his said daughter Sophia and of the son or sons of such son or sons, in such shares and proportions, manner and form, and for such estate and estates, or chargeable with such sum or sums of money to the other or others of them, as the survivor of William and Sophia Lee should appoint; and in default of appointment, or as soon as the estates appointed shall determine, and as to so much as shall be unappointed, to the use of the 1st, 2nd, 3rd, and all and every other son and sons of the body of his said daughter Sophia by her present or any future husband severally and successively and of the several and respective heirs male of their bodies; and for default of such issue *or in case of their death after attaining twenty-one without [*92] leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, or in case William Lee and his wife or either of them shall inherit or possess any of the aforesaid hereditaments and premises by the aforesaid devises, then he directed the said rent-charge to sink into the estate so charged with the payment thereof, and to be annihilated; and he gave to John Cockshutt and his heirs another annuity or rent-charge of 3,000*l.* upon trust for the only proper use and behoof of his said daughter Louisa Wentworth and her assigns

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"until she shall marry (under and with the restriction above mentioned) or for and during the term of her natural life; and when and so soon as she my said daughter shall marry as aforesaid," then upon such trusts, in like manner, and with the like powers, for such estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations, as before declared concerning and in relation to the aforesaid rent-charge devised for the benefit of Sophia. He also gave his daughter Louisa a legacy of 10,000*l.* "payable and to be paid unto her in manner following; that is to say, the sum of 5,000*l.* upon her marriage (with such consent and approbation as aforesaid) and the sum of 5,000*l.* within two years next afterwards." He gave all his personal estate subject to his debts, legacies, and funeral expenses, to Thomas Richard Beaumont; and appointed him executor.

The testator left three co-heiresses at law. Two of them had small annuities by the will. Nothing was given to the third.

Upon the marriage of Mrs. Lee the testator had given her 10,000*l.*

The trustees did not act under this will; and upon the death of the testator, Thomas Richard Beaumont took possession both of the real and personal estate. Louisa Wentworth, while an infant and a ward of the Court of Chancery, went to Scotland with William Stackpole; and they were there married without the consent of the trustees.

Mr. Stackpole was committed to the Fleet: but being in the army he was discharged upon undertaking to make a proposal for a settlement.

[93] The bill was filed by Mr. and Mrs. Stackpole praying, that the trusts of the will might be executed; and that the plaintiff William Stackpole in right of his wife might be declared entitled to the rent-charge of 3,000*l.* and to the legacy of 10,000*l.*, and to have one moiety of the legacy paid immediately; and that it might be referred to the Master to receive a proposal for a settlement; that the accounts might be taken; and that the arrears of the rent-charge together with one moiety of the legacy with interest from the marriage might be directed to be paid for the use of the plaintiffs, as the Court should think proper; and that

the other moiety might be secured for their benefit till the expiration of two years from their marriage.

The issue of the marriage was one son.

Mr. Mansfield, Mr. Graham, Mr. Grant, Mr. Anstruther, and *Mr. Stanley,* for the plaintiffs:

As to the rent-charge the question is, what the words "so" and "such" mean. There is nothing to induce the Court to refer those to the condition, and not to the preceding words. If Mr. Stackpole cannot take, because he does not answer the description, the alternative does not arise; and therefore Mrs. Stackpole's estate for life is absolute; and her children by any husband will be entitled after her death. In the event of a marriage without consent the testator does not take away the provision of his daughter; but only excludes the husband, who has not complied with the condition. Not meaning to punish his daughter he could not mean to punish the children of the first marriage, and carry it over to the children by a second husband. As to the legacy of 10,000*l.*, it is now become a mere question of authority; for none of the cases can be supported by solid reasoning. This is precisely one of those, in which the construction of this Court goes exactly with the Civil Law and the Ecclesiastical Court, that this condition annexed to a personal legacy is only to be considered as *in terrorem.* All the authorities are in *Scott* v. *Tyler,* 2 Bro. C. C. 431.† * * *

Attorney-General, Solicitor-General, and *Mr. Richards,* for the defendants: [94]

It is clear, Mrs. Stackpole is entitled for her life to the rent-charge; and Mr. Stackpole has no interest in it. The question as to the children the Court will not touch now.

The legacy is not payable. *Underwood* v. *Morris,* 2 Atk. 184, was doubted by your Lordship in *Hemmings* v. *Munkley,* 1 Bro. C. C. 303; and Lord THURLOW denied its authority in *Scott* v. *Tyler;* which is decisive, that the character of the legatee not being such as entitles her, and the restraint of marriage not being

† 2 Dick. 712, from Lord Thurlow's MSS.

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absolute, it does not fall into those cases, to which the doctrine of the civil law applies. So far is this condition from being illegal, that the policy of the law approves it.

Mr. W. Agar, for the co-heiresses at law, contended, that they could not be disinherited without express words or necessary implication; therefore under this will Mrs. Stackpole took no estate in the rent-charge; the condition in the parenthesis extending to her interest.

[95] LORD CHANCELLOR:

There is nothing before me now for determination, except the provision to be made for Mrs. Stackpole by a proposal to be made by her husband, and the question upon the legacy. As to the children, it is not proper for the Court to make a declaration upon what will be the construction in cases, that have not happened, and as to which perhaps no question may arise.

It is very clear, that Mrs. Stackpole is entitled for her life to this rent-charge of 3,000*l.* a year. The construction cannot depend upon the parenthesis inserted by the person, who drew the will. It is impossible from any words to argue, that Mr. Stackpole can have a life estate in that rent charge; and it goes contrary to my idea of the clear intention of the testator. Though the person, who drew the will, has a very unfortunate style, and it is very confused and perplexed, I have seldom met with a will, in which the intention was more perspicuous. He meant, as far as circumstances would bear it, to put Louisa precisely upon the same footing as Sophia; treating them both as younger children. Mrs. Lee upon her marriage had 10,000*l.* He gave to her and her husband, whom he knew, a rent-charge jointly for their lives, and the life of the survivor, with remainders to her children. By words of reference describing the particular provision necessary according to the circumstances, in which he foresaw he should leave Louisa, he directs a settlement for her by reference to the rent-charge for Mrs. Lee. He meant to guard against her marriage under age without consent of the persons, he meant to make her guardians. He meant to impose upon them the necessity of finding the hus-

band, he described for her; and in the event of her marrying such a person he gives him the same estate that he had given to Mr. Lee. In all other respects he puts her upon exactly the same footing as Mrs. Lee. Any second husband would no more have been entitled to this life estate than any second husband of Mrs. Lee to the estate, he had given to Mr. Lee. Therefore Mrs. Stackpole is entitled to the rent-charge for her life; and her husband must lay a proposal before the Master.

As to the legacy, this has been long *vexata quæstio.* It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of *personal and out of real estate. The construction ought to be [*96] precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this. In deciding questions, that arise upon legacies out of land, the Court very properly followed the rule, that the common law prescribes, and common sense supports, to hold the condition binding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty upon the supposition, that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions; and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, (it is not right to call it so) in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books, and transferred the rule, without weighing the circumstances, as positive rules to guide them. It is beyond imagination except from that circumstance, how in a Christian country they should have adopted the rule of the

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Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next the favour to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman Empire at that time and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy (it is an odd expression) and for the encouragement of all persons, who would contract marriage, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction, that these conditions *were null. It is difficult to apply that to a country, where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage, their children or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine not to lay conditions to restrain marriage under the age of twenty-one to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent.† This testator places trustees in the room of a parent; and gives *quoad* the marriage the authority to them. I am now called upon to pronounce, that this condition is bad, because it is illegal to impose a condition in restraint of marriage. What: illegal here! I have committed this gentleman for marrying without consent. It is impossible to say, that a condition has any stamp of illegality, impolicy, or impropriety, that does no more than add an extension of bounty to induce them to do that, which neglecting to do the husband becomes an object of the censure of this Court and liable to punishment. Therefore I am perfectly free in this Court in a case, where the condition only operates up to the age of twenty-

[*97]

† Statute 26 Geo. II. c. 33.

one, and requires no more than the general policy of the law and course of this Court hold to be proper, to say, there is nothing illegal in such a condition; and therefore not to determine, that this legacy, which the testator directs to be paid only under certain circumstances, shall be paid, not only though those circumstances have not happened, but where every thing has been done directly in opposition to and defiance of the directions of the will. Confined therefore to such cases, where the restraint operates only up to the age, till which by the law and policy of the country consent is necessary, I have no difficulty to say, there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. In *Scott* v. *Tyler* there is a very accurate though not a very extended opinion of Lord THURLOW,† which carries conviction along with it. The question is not, whether any forfeiture has been incurred; but whether the parties, to whom the legacy is given, have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her 10,000*l.*; that is in effect two sums of 5,000*l.* one payable upon her marriage with consent. She has not married *with consent. She has married without it. Can [*98] she claim the 5,000*l.* under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points, that occurred to Judges sitting here to deliver them from the difficulty arising from the rule of the civil law, adopted without seeing the ground and the reason of applying it to this country under different circumstances. The authorities stand so well ranged, that the Court would not appear to act too boldly, whichever side of the proposition they should adopt: but I have always upon repeated consideration thought, there was not much reason in any of the determinations founded upon a rule applicable to the laws of the country, from which it is taken, but not to this country, and rejecting these conditions as inapplicable to a country, which adopts them as to real property, and where the restraint imposed is analogous

† Lord THURLOW's judgment, from his lordship's own manuscript, has been since published, 2 Dick. 712.

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to the political regulations of the country upon the subject; and here I am deciding upon the plainest circumstances; for the condition is restrained to the age, before which by the law of this country a marriage cannot be had without consent. Therefore declare her not entitled to this legacy.

1796.
July 27.
Rolls Court.
ARDEN, M.R.
[107]

BURTON *v.* KNOWLTON.

(3 Vesey, 107—111.)

Under a devise to trustees who were not the executors upon trust to sell and pay debts and funeral expenses, the personal estate was exempted without express words upon the evident intention that the legatee thereof should take all that was not specifically bequeathed by the will.

MARY COCKELL devised all her freehold, copyhold and leasehold, messuages, lands, tenements and hereditaments, parts and shares of messuages, lands, tenements and hereditaments, and all her real estate, to two trustees, upon trust after her death with all convenient speed to sell, dispose of, and convey, either together or in parcels for the best price, that could be procured, all or any part of her said real estate, and with the money arising from the sale, to pay off and discharge all the mortgages and incumbrances in any wise affecting the real estate and also all other her just debts and funeral expenses; and to lay out the surplus in stock; and to pay and apply the clear rents and profits of her real estate, or so much as should not be sold, and the clear annual income and produce of the money arising from the sale after payment of the debts, for the benefit of her friend Joseph Welch for life; and after his decease to convey, apply and dispose of, all such parts of her real estate and the produce thereof, not sold or applied, to the heirs or heir at law of her cousin William Cockell. The testatrix then gave her family pictures, a worked bed-quilt, a pair of sheets and some other articles of personal property, to her heir at law. She gave several legacies to several persons, and 50*l.* to each of her two trustees over and above a reasonable recompense for their trouble, which she directed them to retain out of the trust

premises. Then after giving several other legacies she gave 200*l.* to be paid by the said trustees after the decease of Joseph Welch to such person and persons and in such manner and form, as he should by any deed or writing under his hand appoint. All the rest and residue of her personal estate and effects whatsoever not before specifically disposed of she gave and bequeathed to the said Joseph Welch, his executors and administrators, upon trust to pay, apply and dispose of, the same, to such person and persons and in such shares, as she should by any writing to be executed by her appoint; and for default of appointment she gave the said residue to the said Joseph Welch for his own use and benefit; and she then appointed him executor.

The testatrix died without having made any appointment. The only question was, whether the personal estate not specifically *disposed of or the real estate should be first applied in discharging the debts. [*108]

MASTER OF THE ROLLS:

This is one of those cases, that come so often before the Court, and which have given rise to such difference of opinion upon the Bench, that it cannot be wondered, that I have taken so much time both in this and in *Brummel* v. *Prothero*, the next cause, that stands for judgment, and upon which I confess, if the consideration of the one did not involve that of the other, I should not have taken so much time: but this cause has given me more pain than any other, that ever came before me: however upon full consideration of the will, and fully subscribing to the principles, that swayed the Court in *The Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454, I am perfectly satisfied, this testatrix did intend to give her personal estate to Joseph Welch exempted from the payment of debts. The cases are very numerous; and great judges have differed upon them. Some have thought the words sufficient to exempt the personal estate: others have thought, they did not afford that demonstration. The cases are all subjoined by Mr. Cox in a note to the case of *Haslewood* v. *Pope*, 3 P. Will. 325. I shall not go into the circumstances of these cases. There are certainly many ingredients in this, that seems to have been relied upon by judges, who have thought the

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personal estate not exempt. The circumstance, that the trustees are not the executors, affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate; and I desire to have it understood, that though the words "funeral expenses" comprised in this trust occur in some of the cases, and are held not to have any considerable weight, yet that is, where the trust fund is given to the executors, to whom the personal estate is afterwards given; and I cannot but think, that where the trust fund is given with such general words to trustees, who are not the executors, upon whom the funeral expenses would naturally fall, it does afford a considerable argument, that the testatrix did not mean the personal estate to be the fund for all those charges, that naturally fall upon it. The subsequent words of the residuary clause convince me, that she did not mean to give it to him as executor, but as a specific legacy, and exempt from the debts; for so far from being given to him as executor, and his being entitled to it as such, it is given to him upon trust to dispose of it according to her appointment, and for default of appointment, for his own use; and then she makes him executor.

[109] I need not state the principles, which have been so often commented on, and are so fully laid down in *The Duke of Ancaster* v. *Mayer*, that unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy and exempt from the payment of debts, it shall be taken subject to them. Great stress was laid in the argument upon the word "residue;" and it was said, Lord THURLOW in *The Duke of Ancaster* v. *Mayer* laid great stress upon that word. I think, in that case a great deal of argument did arise from that word, as there applied: but I cannot read this will without giving to the words "rest and residue" a meaning totally distinct from residue after payment of debts; for those words coupled with the words "not specifically bequeathed" mean only such parts of the personal estate, as are not specifically given; which alludes to what she had before given to the heir or to the leasehold estates given to the trustees. There are so many shades of difference between *The Duke of Ancaster* v. *Mayer* and this case, that a

thousand arguments might arise in that, that do not arise in this; and when I read *Walker* v. *Jackson*, 2 Atk. 624, before Lord HARDWICKE, who certainly differed from Lord TALBOT, and when I read Lord THURLOW's judgment in *The Duke of Ancaster* v. *Mayer*, I cannot think, the word "residue" bears upon this case, as it did on that; for there the trustees were likewise executors. The testator gave all his personal estate to the person entitled to the rents and profits of his real estate. It is not given as a residue, as here: but all his personal estate so given he himself afterwards calls by the name of "residue;" and then, upon which Lord THURLOW very justly laid the greatest stress, and which, I think, put it out of the power of the Court to exempt the personal estate, he nominates the same persons executors of his will, who were trustees for the payment of the debts; and directs them to discharge his funeral charges and all his debts and legacies as soon as they should become due and payable, as Counsel should advise, and to satisfy themselves out of his personal estate or the trust fund, all disbursements, expenses and charges, they should be put to in proving or in the execution of the will. Lord THURLOW thought it too much to say upon such a gift, the trustees holding both funds, and having an option to pay out both promiscuously, that the personal estate was intended to be exempt. Great doubts were entertained upon that case at the time, but I most heartily subscribe to it. But Lord THURLOW there says, what has imposed a most grievous task upon the Court, that it is too late to say, express words are necessary. There are many cases determined in favour of the personal estate, which I *should have had great difficulty to [*110] acquiesce in. *Adams* v. *Meyrick*, 1 Eq. Ab. 271, is a very weak case. In *Stapleton* v. *Colville* the circumstance laid hold of by Lord TALBOT does not satisfy my mind; nor does it seem to have satisfied Lord HARDWICKE and Lord THURLOW: viz. the mere circumstance of the executor having a power to raise so much out of the term, as would be sufficient for the debts. I have felt great anxiety and difficulty for fear of drawing so nice a line, that judges can hardly tell how to guide themselves in determinations of this sort. I have looked very carefully at *Walker* v. *Jackson*; and it must be remembered, that Lord HARDWICKE, who

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determined that case, thought the words not sufficient in *Lord Inchiquin* v. *O'Brien*, Amb. 33; 1 Wils. 82. In the former he considered all the cases. In applying that case to this I am perfectly satisfied, that if he was right in the consequence, he drew in that case, I am warranted in that, which I have drawn in this. It was upon the codicil, that Lord HARDWICKE's opinion turned, as affording a presumption for the exemption of the personal estate: but if the report is right, he did not rest merely upon its being by way of codicil; but thought, that if it had been in the will, it would be a strong case for the exemption of the personal estate. So I think; for the codicil is only part of the will; and it is to be taken altogether. This testatrix having given this fund in the largest words to pay all mortgages and incumbrances and all other debts and even her funeral expenses, to persons, who are not those naturally to pay them, gives the rest and residue, not before specifically bequeathed, to the person, whom she makes executor; but not as executor; for she had an intention of appointing it; and then in default of appointment she gives it to him for his own use. Compare those words with *Walker* v. *Jackson*. I think, I am perfectly warranted in saying, there is demonstration plain, that she did not mean to give it to him as executor, but specifically for his own use and benefit and exempt from the payment of debts. I have had great difficulty; and am much afraid of breaking in upon established rules; which I never desire to do. There is a case, which is not reported; and was suggested by me; and deserves some account, to shew, that the principles of it are not broken in upon. It is *Gaskill* v. *Hough*, February, 1774; in which I was counsel. The Court thought the personal estate exempted. That depends upon a very different principle. It was neither a charge for debts, nor a devise for payment of [*111] debts; for I *am not one of those Judges, who think there is much difference, whether it is the one or the other, unless there is demonstration, that the personal estate is intended to be exempted. That case was, not a charge upon the real estate, but an express direction and declaration, that the debts, funeral expenses and charges of probate, should be paid out of the real estate; and the testator then gave his personal estate to his

wife, except a leasehold estate in Stockport; which he gave to another. The heir was an infant. The Court has never gone the length of saying, that in such a case the real estate is not particularly appropriated; and from that very appropriation the personal estate is exempt.

Fully acquiescing in *The Duke of Ancaster* v. *Mayer*, I am perfectly satisfied, that I am warranted in holding, that this personal estate is given to Joseph Welch exempt from the payment of debts.

MANNING *v.* SPOONER.*

(3 Vesey, 114—119.)

1796.
May 12,
July 27.

Rolls Court.
ARDEN, M.R.
[114]

Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor.

The order of application to debts: 1st, the personal estate, unless exempted expressly or by plain implication: 2ndly, estates devised for the particular purpose of paying debts: 3rdly, estates descended: 4thly, estates devised.

CHARLES SPOONER by his will, dated the 14th of January, 1785, after some specfic and pecuniary legacies gave all the residue of his personal estate to trustees, in trust to convert the same into money, and thereout in the first place to pay all his debts and funeral expenses, and also the legacies therein mentioned; and if there should be any surplus of the monies to arise from his said personal estate, he directed, that it should be laid out in the purchase of 3 per cent. consolidated Bank Annuities upon the trusts after declared. He gave all his messuages, plantations, lands, tenements, and hereditaments, and all his real estates whatsoever, whether in possession, reversion, or remainder, situate in the islands of Antigua, St. Christopher's, and Tortola, together with all the buildings, slaves, horses, mules, cattle, and plantation utensils, and implements, and chattels of all sorts, therein or thereunto belonging, to the use of the said trustees, their heirs, executors, administrators and

* *Scott* v. *Cumlerland* (1874) L. R. 18 Eq. 583.

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[*115]

assigns, upon *trust, that they should during the life of his wife, and until the sum of 8,000*l.* 3 per cent. consolidated Bank Annuities should be raised, as after directed, and also till such farther sum should be raised, as after mentioned, cultivate and manage, and receive the rents, issues and profits, of the said plantations and estates, and apply the same, after paying and securing some annuities therein mentioned, in payment of such of his debts and legacies, as the residue of his personal estate should prove deficient in paying: and should lay out and invest the residue and surplus of the annual rents and profits of the said estates and premises from time to time in the purchase of 3 per cent. consolidated Bank Annuities in the names of his said trustees, until the said Bank Annuities together with the Bank Annuities (if any), which should be purchased with the surplus of his personal estate, should amount to the sum of 8,000*l.* 3 per cent. consolidated Bank Annuities; and subject thereto, and after the death of his wife, he directed, that his trustees should convey the said plantations, estates and premises, in the islands of St. Christopher's and Tortola to the use of his nephew Hungerford Spooner and his issue male in strict settlement with divers remainders over; and he directed them to convey his said plantations, estates and premises, in Antigua to the use of his nephew Peter Shaw and his issue male in the same manner with divers remainders over; and he declared, that all the negroes, cattle, stock, plantation utensils and implements, on and belonging to the said several estates should go along with the freehold and inheritance of the said estates respectively. He gave 1,000*l.*, part of the said 8,000*l.* 3 per cent. annuities to his niece Mary Shaw, and the remainder of the said 8,000*l.* stock to several other nephews and nieces; and he appointed his trustees executors with his wife.

The testator at the date of his will was not seised of any real estates except those, he had devised. Afterwards in August, 1787, he purchased in fee simple an estate at Landford, in Wilts. He died upon the 12th of May, 1790, leaving his niece Isabella Spooner his heir; who, the will not having been republished, entered upon the estate at Landford; and sold it for 4,200*l.*

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The widow and one of the trustees being dead, the will was established and the usual accounts directed upon the bill of the surviving trustee. A supplemental bill was afterwards filed by the surviving trustee, the devisees and legatees, praying an account of the rents *and profits of the Landford estate received by the defendant Isabella Spooner and of the purchase-money; and that in case the specialty creditors should have exhausted any part of the personal estate, the legatees might stand in their place upon the real estate descended. The purchase-money of the Landford estate was paid into Court. It was decreed, that the accounts should be carried on in the original cause. The Master reported, that 5,047*l.* had been received from the personal estate, and applied in discharge of debts and legacies; and that 9,739*l.* remained due to the specialty creditors for principal and interest. The cause coming on for further directions, the question was, whether the descended estate was liable to the debts before the application of the fund to arise from the devised estate under the trust in the will ?

[*116]

Mr. Piggott and *Mr. Thomson*, for the devisees. * * *

Mr. Lloyd, *Mr. Grant*, and *Mr. Allcock*, for the heir. * * * [117]

[The cases cited by counsel are referred to in the judgment.]

MASTER OF THE ROLLS :

July 27.

The question, whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts ; or whether it is only a general charge for that purpose ; for upon the doctrine, that is very fully laid down by Lord THURLOW in *Donne* v. *Lewis*, 2 Bro C. C. 257, there is no doubt of the manner in which the estate of a testator is to be applied in discharging his debts. That case had a very full consideration and discussion ; and it was determined upon principles, that have been constantly acted upon since; and which must govern all such cases. From that I collect, that there are four classes of estates to be applied to the debts : 1st, The general personal estate, unless exempted expressly or by plain implication : 2dly, Any estate particularly devised for the

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[*118]

purpose, and only for the purpose, of paying debts: 3dly, Estates *descended: 4thly, Estates specifically devised. The question therefore is in every case, where the contest is between an estate descended and an estate alleged to be provided for the debts, whether it is a general charge, or any part of the estate is selected for the express purpose of paying the debts. If part is selected for that purpose, that part shall be applied before the descended estate; whether the testator had that estate before he made his will, or not. Lord THURLOW, in considering *Galton* v. *Hancock*, *Wride* v. *Clark*, and *Davies* v. *Topp*,† is clearly of opinion, that the question is, whether the testator has selected any part of his estates, which it was his will should be first applied; or whether the charge is only to subject his estates to the payment of his debts; which otherwise perhaps could not be applicable to them. That will not make the devised estates applicable in the distribution before those descended. Then taking this case for my guide I am only to consider, which is the case here; whether it is a general charge, or part is selected and appropiated to the debts; and the words are so emphatical as fully to convey the principles, that will guide the decision; especially when we consider the nature of this property; which is situated in the West Indies; and is liable to all his debts independently of any will of his. But even if it was an English estate, which is not liable to all debts, even in that case I should have thought, that a provision of this sort appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied. I cannot consider this as being a general charge for the purpose only of preventing any of his debts remaining unpaid; for the law of the country, where they lie, had sufficiently provided for that; therefore if it is to have any effect, it must be to appropriate this fund, and for no other purpose. If so, the question is, whether according to the principles laid down in *Donne* v. *Lewis*, the plaintiffs have a right to call upon the heir, to whom the estate purchased after the date of the will has descended, to apply that estate first to the debts; and I am of opinion, the heir cannot be called upon to contribute, till that fund, so appropriated, not merely to take

† See notes to *Donne* v. *Lewis*, 2 Br. C. C. pp. 259—261.

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care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted. The heir cannot avail herself of this except by being reimbursed out of the rents and profits of this trust fund. She cannot postpone the creditors. That was the case of *Lingard* v. *Lord Derby*, 1 Bro. C. C. 311. The testator may arrange between his heir and devisee; but not so as to take away from *the creditor a fund, he has a right to come upon. But if creditors are not concerned, the plaintiffs have no right to call upon the heir; and the money must be paid to her; and the supplemental bill must be dismissed.

[*119]

Note.—See the next two cases, which for convenience of reference are here inserted out of their proper order in point of date.

WILLIAMS *v.* CHITTY.†
CHITTY *v.* CHITTY.

(3 Vesey, 545—552.)

1797.
June 28 *and* 30, *Aug.* 15 *and* 16.

LOUGHBOROUGH, L.C.

[545]

Real estates devised held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expenses should be first paid: that, which descended to the heir by the failure of the devise, to be first applied.

* * * JOSEPH CHITTY by his will, dated the 30th of November, 1782, ordered and directed all his just debts and funeral expenses to be first paid; and then reciting, that by the will of his late uncle, Josiah Chitty deceased, his freehold and copyhold estates in Essex, whereof he had not barred the remainders, would descend to his eldest son, the testator declared, he therefore did not make any provision for the said son by that his will other than as thereinafter mentioned: but having in order to make some provision for his younger and other children barred all and every the remainders in and by his said uncle's will limited of the estates in London thereby devised to him in tail, he gave, devised and bequeathed, all his messuages, ground, hereditaments and premises, in London to his wife and Adam Jellicoe and their

† *Stead* v. *Harduker* (1873) L. R. 15 Eq. 175, 42 L. J. Ch. 317.

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heirs, upon the trusts and for the uses therein declared concerning the same: that is to say; as to his two messuages in Lombard Street, in trust to and for the use of his daughter Sarah Chitty, her heirs and assigns; but in case of her *decease under [*547] twenty-one and unmarried, in trust to and for the use of his daughter Elizabeth Chitty, her heirs and assigns: but in case of the decease of both his said daughters under twenty-one and unmarried, to the use of his eldest son Joseph Chitty, his heirs and assigns for ever. [And after making other specific dispositions for the benefit of his children and after giving directions for their maintenance and education the testator gave all the residue of his personal estate including arrears of rent to his wife, her executors, &c.; and appointed her and Adam Jellicoe his executors.]

[548] Adam Jellicoe died in the life of the testator. The testator's daughter Sarah also died in his life under twenty-one and without issue, but having been married. The testator died in 1795; leaving four children, Joseph, Elizabeth, Charles, and Marian; all under the age of twenty-one.

The first bill was filed by creditors of the testator by simple-contract for an account of the personal estate; and in case it shall not be sufficient to answer the debts, that the deficiency shall be made good by sale of the real estates devised and charged with the payment of debts. The second bill was filed by the widow to have the interests of the children ascertained; [*549] an account of the debts, *funeral expenses and personal estate, of the testator; that the deficiency of the personal estate to answer the debts may be raised by mortgage or sale of the real estate. * * *

The causes coming on for farther directions, the questions were; 1st, whether the real estates were charged by the will with the debts: secondly, whether in the events, that happened, the devise over to Elizabeth Chitty of the two houses in Lombard Street was good; or whether these houses descended to Joseph Chitty as heir at law; and if so, thirdly, whether those premises were not liable before the estates devised to the other children; supposing the real estates charged with the debts.

The second question was given up by the *Solicitor-General* for

Elizabeth Chitty. [There was also a question of dower, which does not require further notice.]

Attorney-General and *Mr. Hart* for the widow, *Mr. Mansfield* and *Mr. Stratford*, for the creditors:

* * * The real estate is charged with the debts * * * This [550] testator did not mean to part with any of his property, till his debts were paid. Unless this real estate is charged, he has not charged any of his property, which would not otherwise be liable. [They cited *Hatton* v. *Nichol*, For. 110; *Trott* v. *Vernon*, Pre. Ch. 264; *Lord Godolphin* v. *Penneck* (see judgment, *post*).]

Solicitor-General, *Mr. Grant* and *Mr. Holford*, for the children:

The reasoning in all these cases, where the testator introduces the devise by directing, that all his debts shall be first paid, does not apply to this case. The real estates, that he could so charge, he has given as a provision for his younger children. He has expressly stated the reason for barring the intail of one part of his estate and not of the other. He could not mean his younger children to bear the whole burthen out of their share, while the eldest son would avoid any part of it. * * *

Reply. * * * [551]

LORD CHANCELLOR:

It is impossible not to entertain a strong wish, that the Court was able to make a man do that, which is morally just. My feeling upon this will is, that there is a total absence of intention as to paying his debts out of the real estate. He desires his debts and funeral expenses to be paid in the first place. Then he gives a historical account of the state of his affairs, and makes a provision very specific; even to directing the *quantum* of maintenance. The disposition of his real estate is formed upon a calculation to keep a proportion between his eldest son and younger children. He clearly supposes, there will be a residue of his personal estate. I do not say, whether I should have adopted the construction in *Trott* v. *Vernon* and *Hatton* v.

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Nichol: but I should be extremely glad in a parallel case to follow those determinations. In *Kightley* v. *Kightley*† the MASTER OF THE ROLLS states a difference between debts and legacies: I do not know how to state a difference between them. I should be very glad to submit to the rule, if I can find it, that wherever there is mention of debts in a will, and that will devises the real estate, that shall throw the debts upon the real estate. *Leigh* v. *Lord Warrington*‡ is a very strong case; for the personal estate was equal to all the debts except a debt of 1,000*l.* and the [*552] testator could have no possible idea, *that could be demanded against him; for it was to be invested in land, of which he would have been tenant in tail, and which by suffering a recovery he could have disposed of. It rather seems, that Lord HARDWICKE in *Lord Godolphin* v. *Penneck* adopted one of the reasons in *Lord Warrington's* case, that certainly goes to establish as a general rule, that where there is a desire, that the debts shall be paid, and the real estate is devised, the real estates shall be subject to the debts. I shall desire the Registrar to take out the words of the will in *Lord Godolphin* v. *Penneck* to see, whether it agrees with the reasoning.

LORD CHANCELLOR:

Aug. 15 *and* 16.

I have had the Registrar's Book searched for the case of *Lord Godolphin* v. *Penneck;* and as it was suggested by the *Attorney-General* that the will might be taken short in the Registrar's Book, I directed a search for the will: but the will cannot be found. We must therefore take it as it stands upon the Registrar's Book and in the report; and then, to be sure, it is an authority, that if the testator talks about debts in the beginning of his will, the real estate must be charged.

As to the third question, the descended part must be liable before the devised. I look upon it as general assets. In the distribution of assets the Court always applies assets not specifically given to any one before assets, that are specifically given.

Note.—See preceding case and following case.

† 2 R. R. 224. ‡ 4 Bro. P. C. 90.

SHALLCROSS *v.* FINDEN.

(3 Vesey, 738—740.)

1798.
May 3, 7.

Rolls Court.
ARDEN, M.R.
[738]

Devise after payment of debts: the debts are charged. Distinction between debts and legacies in an implied charge upon an estate specifically devised.

RICHARD WARD being seised of the remainder and inheritance of freehold estates in Leicestershire, expectant upon an estate for life in his father, and subject to a mortgage, by his will made the following disposition:

"After payment of all my just debts funeral expenses and the expenses of the probate hereof as likewise my testamentary articles I give and bequeath unto my trusty and worthy servant Mary Heath the sum of 50*l.* of true and lawful money of Great Britain to be paid unto her as soon as convenient after my decease. And as to such expectancys in fee in reversion or any other claim I may hold upon that freehold tenement situated at Husband's Bosworth com. Leicester now in possession of Samuel Stevens at the time of my decease I give and bequeath the whole of such title and claim unto my dearly beloved father William Ward for his own use and benefit for ever. I likewise bequeath unto my said dearly beloved father all my household furniture linen and wearing apparel likewise plate pictures &c. &c."

The testator appointed his father executor.

After the deaths of the testator and his father the bill was filed by the simple-contract creditors of the former against the devisees in trust and legatees of William Ward, the father; the simple-contract debts of Richard Ward exceeding his personal estate to the extent of 670*l.*; and the question was, whether by his will those debts were charged upon his real estate.

Mr. Graham and *Mr. R. Smith* for the plaintiffs contended, that the words "after payment of all my just debts" afforded an irresistible inference of an intention to dispose of what should remain after payment of his debts. They relied on *Williams* v. *Chitty*, *ante*, p. 71, where several cases upon this point are cited, and *Kidney* v. *Coussmaker*, 2 R. R. 118.

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[*739]

Mr. Piggott, for the defendants:

The question is, whether those words over-ride the whole will. In *Lord Godolphin* v. *Penneck*, *2 Ves. sen. 271; and *Leigh* v. *Lord Warrington*, 4 Bro. P. C. 90, there were words, that made it natural for the Court to do what they did. The Court is glad to find, that there are any expressions in the will, from which they can make the testator do that, which is morally just: but such expressions must be found. This is only a direction, that before the legatee of 50*l.* can claim that legacy, which must be paid out of the personal estate, the debts shall be paid. The testator gives expressly the whole of his interest in the real estate, which excludes the implication, that arises in the other cases.

MASTER OF THE ROLLS:

Is there a single case, in which the testator has said "after payment of my debts," and the Court has said, it shall not affect all the real estate, whether specifically devised, or not? I do not know such a case. The words "after payment of my debts" mean, that he will not give any thing, until his debts are paid. He could not help paying his debts out of his personal estate. He could not give a pecuniary legacy but after his debts paid. Therefore if I do not make that construction, part of the will is perfectly nugatory. I agree, that if a testator does manifest in any part of his will, that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. "After payment of his debts" means, that, until his debts are paid, he gives nothing; that every thing, he has, shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion, that wherever a testator says, he wills, that his debts shall be paid, that will ride over every disposition, either as against his heir at law or devisee; and the words "after my debts paid" mean the same thing.

As to the distinction between debts and legacies, I am still of the same opinion, that I held in *Kightley* v. *Kightley* (2 R. R. 224); though the LORD CHANCELLOR in *Williams* v. *Chitty* (*ante*, p. 74), doubted my distinction. I cannot agree, that, where

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there is a specific devise, there is no difference between debts and legacies. The testator must be taken to mean his debts to be paid, and then his legacies to be paid; and a specific devise is as much a legacy in this sense as a pecuniary legacy. If a testator directs his legacies to be paid, and then gives a house or a horse, there is no reason why a specific devise should not take effect as much *as a pecuniary legacy. He has as much intention, that a specific legacy shall go to the legatee as a pecuniary one. [*740]

Declare, that the debts are charged upon the real estate.

JENNINGS *v.* GALLIMORE.†

(3 Vesey, 146—148.)

1796. *June* 7.

Rolls Court. ARDEN, M.R. [146]

Money settled in trust to be paid according to the appointment of A. and in default thereof to his legal representatives according to the course of administration; A. by will in pursuance of the power appoints to his legal representatives according to the course of administration; and makes a residuary legatee, whom he appoints one of his executors. Upon the will the next of kin are entitled.

UPON the marriage of Thomas Turner and Dorothy Gallimore 1,000*l.* was settled in trust, to invest it in government or real securities, and pay the dividends or interest to Dorothy Gallimore, to her sole and separate use; and after her decease, in case there should be any issue of the marriage living, to divide the principal among the children share and share alike at twenty-one or marriage; but in case Thomas Turner should have no issue by Dorothy Gallimore, or they should all die in her life, then immediately after her death without issue of her body then living as aforesaid to pay the said 1,000*l.* to Ambrose Gallimore, in case he should be then living; but if dead, then to such person or persons, and to and for such use and uses, intents and purposes, as he should by deed or will appoint; and for want of such appointment, then unto the legal representatives of him, the said Ambrose Gallimore, according to the course of administration.

† *Briggs* v. *Upton* (1872) L. R. 7 Ch. 376, 382, 41 L. J. Ch. 519.

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[*147]

Ambrose Gallimore by his will reciting the settlement and his power of appointment proceeded thus: "Now I do hereby in *pursuance of such power direct and appoint the said sum of 1,000*l.* in case my said niece Dorothy Turner should happen to die without issue, to be paid by the said trustees or the survivor, his executors, administrators or assigns, unto my legal representatives according to the course of administration;" and he gave the rest, residue and remainder, of all his real and personal estate and effects whatsoever or wheresoever, to his nephew William Gallimore, son of his elder brother, and to his heirs and assigns for ever. He appointed his said nephew residuary legatee, and appointed his said nephew and John Home executors.

Dorothy Turner died without issue. The question as to the 1,000*l.* was between the assignees of the testator's nephew William Gallimore, a bankrupt, and the other next of kin, a sister and nieces.

Mr. Lloyd, for the next of kin, after citing *Bridge* v. *Abbot*, 3 Bro. C. C. 224, was stopped by the Court.

Mr. Graham and *Mr. Pemberton*, for the assignees:

Upon the deed, the expression, which he follows exactly in the will, must mean the persons by law his legal representatives: viz. his executors. Why is the popular, loose, vulgar sense to be adopted instead of the legal sense? The will must be construed as the deed creating the power; of which it is clearly intended to be an execution. Neither he nor the authors of the power meant all these persons.

MASTER OF THE ROLLS:

If it had rested upon the settlement itself, I should have had great doubt of being able to get over the words "legal representatives;" and if he had died intestate without executing the power, I should have paused long, before I could have given any other interpretation than that contended for by the assignees: but I cannot read this will without implying an intention to consider it otherwise. He would never have made such a will,

if he had thought, all the words he had used came to nothing more than executing the power by giving the fund to William Gallimore; which power he anxiously takes the trouble to execute, and expressly recites, that it enables him to give it any person, he thinks fit. If he meant to give it to him, *to whom he has given all the rest, why did he not say so? I am now told, this recital and anxious execution of the power and distinction of this fund from the rest, means only to give it to him, to whom he might, if he thought fit, have given it expressly. I cannot think, he so intended it. As a lawyer I must have understood the words, as the assignees do. If it was upon the deed alone, and he had died intestate, I must have considered, that it was a deed; and though I could not know, what the party meant, I must have given the words their legal sense: but it is almost impossible to suppose, any man using these words could have meant the construction contended for by the assignees; and which perhaps might without the will have been the true construction: but I desire not to be understood to decide that. But upon the will I am of opinion, first, that he did not intend William Gallimore to have this fund; and then the only persons, who can take it, must be those entitled to his personal estate. Therefore declare, that it belongs to the next of kin. I desire, it may be understood, if this case is quoted, that I am not by this putting any construction upon the deed itself: it is entirely upon the will and the execution of the power thereby.

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ABBOT *v.* MASSIE.

(3 Vesey, 148—149.)

1793.
June 8.
LOUGHBOROUGH, L.C.
[148]

Legacy to Mrs. G. Evidence admitted. Executor, refusing to act, cannot take a legacy to him as executor.

TESTATOR bequeathed "to Mr. James Massie of St. Martin's Lane and W. G. 50*l.* as executors: pint silver mug and all my china to Mrs. G. and 10*l.* for mourning."

Mr. and Mrs. Gregg claimed under the description of W. G. and Mrs. G.: but the former refused to act as executor. The

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ABBOT
v.
MASSIE.

Master refusing evidence, that they were the persons intended, they excepted to the report.

Mr. Mansfield and *Mr. Hart*, for the exception, cited *Masters* v. *Masters*, 1 P. Wms. 421, and *Baylis* v. *The Attorney-General*, 2 Atk. 239; where Lord HARDWICKE mentions instances, in which evidence has been admitted.

The *Attorney-General*, for the report, cited *Hunt* v. *Hort*, 3 Bro. C. C. 811.

[149] LORD CHANCELLOR:

The Master should receive evidence, but legal evidence, to prove, who Mrs. G. was: but as to the 50*l.*, it is impossible that can be allowed; because it is given to him as executor; and he did not prove the will. I must over-rule the exception with regard to that. I do not mean to tell the Master, what evidence he is to receive.

Upon this it was agreed, that Mrs. Gregg should take the silver mug, the china, and 10*l.*

1796.
June 23, 24,
and 29,
July 5.

Rolls Court.
ARDEN, M.R.
[170]

LORD CRANSTOWN *v.* JOHNSTON.*

(3 Vesey, 170—184.)

This Court having jurisdiction *in personam* upon an equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was upon the circumstances held only a security for the debt, the expenses of the proceeding and incumbrances paid by him, with interest; and subject thereto a reconveyance was decreed.

THE bill was filed upon the following case. After various dealings between the plaintiff and defendant previous to the year 1788, which produced a bill by the defendant, they agreed

* *Liverpool Marine Credit Company* v. *Hunter* (1868) L. R. 3 Ch. 479, 485, 37 L. J. Ch. 386.

to an arbitration. Upon the 8th of July, 1789, an award was made, that Lord Cranstown should upon the 1st of March, 1790, pay at Lloyd's Coffee House 2,521*l.* 10*s.* 9*d.* At the time of the award the plaintiff was abroad, and he did not comply with it. He was entitled to the reversion upon the death of his mother of a plantation in the island of St. Christopher; the average produce of which was 5,000*l.* a year; and during the life of his mother he was entitled to an annuity of 300*l.* charged upon that plantation. The defendant immediately after the expiration of the time limited by the award procured an agent to institute proceedings in the island against the plaintiff in his absence; and thereby obtained payment of the said annuity since the 25th of December, 1789. The plaintiff returned to England in 1791; and frequently offered to pay the defendant, and requested him to come to an account: but he refused to refund; and after the expiration of the time commenced an action in the Court of King's Bench and Common Pleas in the island, obtained judgment, *and caused an execution to be taken out; and thereby the [*171] Deputy Provost-Marshal of the island seized and put up to public sale the said rent-charge and reversion; and the defendant became the purchaser of both for 2,000*l.* currency; and a bill of sale and conveyance was executed to him by the said Deputy Provost-Marshal; by means of which he was become entitled to his own use * * The plaintiff was not personally resident or present in the island, or at any place within the jurisdiction, nor at any time during the proceedings, nor since. No appearance was entered for him: no defence was made; nor was he served with process. * * *

This cause was argued very fully by *Mr. Hardinge*, *Mr. Graham*, and *Mr. Hart*, for the plaintiff; and *Mr. Piggott*, *Mr. Grant*, and *Mr. Trower*, for the defendant. * * * [179]

THE MASTER OF THE ROLLS, [after deciding that it was a clear case for relief in equity, continued as follows:] [182]

Upon the whole it comes to this; that by a proceeding in the island an absentee's estate may be brought to sale, and for whatever interest he has, without any particular, upon which they are to bid: the question is, whether any Court will permit

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the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly, that it is strange for this Court to say, it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such an use to be made of the law of that island or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here. *Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, *Lord Kildare* v. *Eustace*, 1 Eq. Abr. 133, 1 Vern. 75, 135, 419. Those cases clearly shew, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, [*183] particularly in the British dominions, *this Court will hold the same jurisdiction, as if they were situated in England. Lord HARDWICKE lays down the same doctrine, 3 Atk. 589. Therefore without affecting the jurisdiction of the courts there, or questioning the regularity of the proceedings as in a court of law, or saying, that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws, to proceed behind the back of the debtor upon a constructive notice, which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this Court will not permit him to avail himself of

the law of any other country to do what would be gross injustice.

It is said, what if the sale had been to a third person? I am glad, I have not to determine that. A third person might have a great deal more to say, than this defendant can. He might say, the law of the island authorises a lottery; and having bid he has a right to retain it. But this defendant has no such right except for the purpose of paying himself the debt. The Crown never thought of availing itself of an outlawry to keep the estate or give it to the creditor. In the island it has been thought expedient to grant a sale in order to make payment of debts speedy: † but then it shall be only for that purpose, and subject to redemption. I have some doubt as to what has passed since the sale. If with full knowledge the plaintiff had forborn to seek his remedy, and had lain by to the defendant's disadvantage, merely for the sake of his own accommodation, I should have thought, he had forfeited his right to redemption. If the defendant had said, he must be paid by a certain time, or he would avail himself of his purchase, he had a right to do so: but that does not appear. In November, 1792, some offers were made, which I do not wonder he refused: and then immediately the bill was filed. The question is only, whether the plaintiff is too late. I have no scruple to say in this cause, it would be unconscionable to permit the defendant to avail himself of the laws of this island to procure this estate for any other purpose than to pay him his own debt. It is clear upon the correspondence, he did mean to take an advantage, which the law *of the country [*184] was not calculated to give him, but of which he might avail himself. It is not clear, that he did wrong in selling behind the plaintiff's back; because there was a possibility of the plaintiff's defeating the judgment by some act here; therefore he was right to go to a sale: but then he ought to have said, he was willing to be redeemed. He is therefore fully entitled to all the costs of the proceeding in that country: but the use, he has made of it, under all the circumstances I cannot permit.

Therefore on payment of the money awarded, and such sums as the defendant has paid in the island, with interest at 5 per

† Statute 5 Geo. II. c. 7.

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LORD CRANSTOWN v. JOHNSTON.

cent. he must reconvey, subject to other incumbrances. Take an account of what is due for principal and interest, and also of what is due upon the payments of the annuity with interest; and reserve the costs.

1796. *March* 21 *and* 22, *July* 28.

LOUGHBOROUGH, L.C. [238]

ELTON, EX PARTE.

(3 Vesey, 238—243.)

Upon petition of joint creditors to be admitted to prove under a separate commission it was ordered, that they shall be admitted; but not to receive a dividend; and that the dividend shall be reserved, till an account is taken of what they have or might have received from the partnership effects.

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts.

In bankruptcy the usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other.

WILLIAM FRY and others carried on business in partnership as cotton manufacturers under the firm of William Fry and the Rawleigh Company. In July, 1792, in consideration of 1,000*l.* paid by the petitioners to William Overend, one of the Rawleigh Company, a bill of exchange for that sum was duly indorsed to the petitioners. The bill was dated the 9th of July, 1792, and was drawn upon Fry and his partners, and accepted thus in the hand-writing of Fry: "accepted W. Fry and Rawleigh Company." In May, 1793, a separate commission of bankruptcy issued against Fry as distiller, dealer and chapman. The bill not being paid upon applications to the Rawleigh Company, the drawers, and the indorsers, the petitioners attempted to prove the debt for the purpose of receiving a dividend under the commission. The commissioners reserved a dividend upon the claim, in order that the opinion of the LORD CHANCELLOR might be taken.

LORD CHANCELLOR:

This petition seems to me to be a matter under very pressing circumstances. I do not mean to decide it now; for upon con-

sidering what has been stated and looking into the cases collected by Mr. Cooke it appears to have been understood for some time, that a joint creditor is entitled to prove and receive a dividend from the separate estate. At the same time I understand from the *Attorney-General*, that he does not think that settled as matter of law, but of convenience, and subject to this limitation; that if the assignees of the separate estate think fit or will undertake to file a bill, the creditor admitted to prove is to be restrained from receiving a dividend. If it stands so, it is an order, that can only be made here in this Court: it is impossible for the commissioners either in town or country to admit, as this petition supposes, a joint creditor to take a dividend *under the separate commission; for they have no authority: it is impossible they can decide of themselves; for an option to be given to assignees is a thing, that can only be done by an order here: the commissioners have no power to do it. The consequence therefore in every such case, is, that there must be a petition. There is another inconvenience, if the matter remains, as it now stands: one set of commissioners acting upon the authority of the first edition of Mr. Cooke's book would certainly refuse the claim; another set acting upon the second edition would certainly admit it. It stands therefore in a situation, in which commissioners would find great difficulty how to act. It has been understood for a considerable time according to Mr. Cooke, that there is no difficulty in the Court's directing the commissioners to receive the proof of the joint debt. Antecedent to these authorities I should have thought it perfectly clear, it could not be done; and that the utmost length, they could go, was, that a joint creditor, where there is a separate commission, is to be admitted to prove only for the purpose of assenting to or dissenting from the certificate, and receiving such surplus beyond the amount of the separate debts, as joint creditors would be entitled to claim, where there are two commissioners. I doubt, whether it is possible to innovate upon that, which was the law formerly; for though a commission is an execution, and the joint creditor has such an interest as enables him to take out a separate commission, yet the consequence does not follow. There are cases antecedent to those cited. In Lord King's time

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ELTON, Ex parte.

it was determined, that a joint creditor might be a good petitioning creditor, though the commission is only against one partner; that the joint creditor does no more in taking his execution, passing over his action, than bringing the separate effects to be administered in bankruptcy. But it is not treated any longer as an execution at law; for the effects taken under it are not disposed of as at law, but fall immediately by the direction of the statute under the administration of this Court; which is to make an equitable distribution among the creditors, to admit all equitable claims upon the effects, and to divide them rateably. It has been long settled, and it is not possible to alter that, that each estate is to pay its own creditors. With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution, he has taken out. He is precluded from suing at law; and it would be against all equity, having done it for their benefit, to refuse him the fruit of [*240] that for his own debt. *But any other joint creditor is in exactly the case of a person having two funds; and this Court will not allow him to attach himself upon one fund to the prejudice of those, who have no other and to neglect the other fund. He has the law open to him: but if he comes to claim a distribution, the first consideration is, what is that fund, from which he seeks it. It is the separate estate; which is particularly attached to the separate creditors. Upon the supposition that there is a joint estate: the answer is "apply yourself to that: you have a right to come upon it: the separate creditors have not: therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund." There would be no great inconvenience, if he could put them in his situation as to the joint fund: but I doubt very much, whether that is possible; for suppose in the case of A. and B., partners, the former remains solvent, the latter becomes a bankrupt, and there is a joint debt of 1,000*l.* The creditor making his claim first against the separate estate, paying a dividend of 10*s.* in the pound, receives 500*l.* Can the assignees claim against the solvent partner what they have paid? His answer would be they could only claim the same right the bankrupt could; and as against the bankrupt he is entitled to retain: he has paid his

moiety of the partnership debt. If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him; and he has a right to come in as a separate creditor of the bankrupt to the amount only of a moiety of that debt; for a moiety only of the debt of the partnership he could have recovered against him, if he had been solvent. That makes a very great difference to the separate creditors. I was led to consider another thing: is it possible to admit a separate creditor to take a dividend upon the joint estate rateably with the joint creditors? No case has gone to that; and it is impossible; for the separate creditor at law has no right to sue the other partner. He has no right to attach the partnership property. He could only attach the interest, his debtor had in that property. If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases not only in bankruptcy, but upon general equity, that the joint estate is applicable to partnership debts, the separate estate to the separate debts. Another difficulty is, whether really it is just to put it to the assignees in behalf of the separate creditors to assert the right of the creditor making the claim, to go against the joint estate. *The creditor coming in upon the separate [*241] estate is first to answer the question, why he does not go against the joint estate. It may be said, "the law is open to you: it is not open to us. You put us to file a bill against the other partners to discover and apply the partnership fund. You have a much quicker remedy: sue the partnership. You need not wait the account. They will settle it rather than put you to that: at all events you have a legal execution against them." Another consideration is, that the great object of the law in establishing this sort of authority, in which I now sit, is to make a speedy distribution and to avoid suits. The necessary consequence of admitting a joint creditor to prove against the separate estate is in every such case to make a Chancery suit; and the right of the separate creditors to the administration of their fund is frustrated.

I throw out this, desiring extremely to have the assistance of the Bar, and of those who are peculiarly conversant with the subject, to point out the balance of convenience and inconveni-

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ELTON, Ex parte.

ence; whether it is right to adhere to what is the rule according to the last determination, or to reconsider and recast the whole. There is nothing so inconvenient as leaving a point, that must so frequently occur, to any ambiguity. It cannot remain as it now stands. If it is a petition of course, it is under singular circumstances; for there is nothing purely of course to be done by petition to me, that I cannot by a general rule direct the commissioners to do: I doubt, that is impossible here; for they could not put that guard upon it, that it should not be a general order, but that the assignees might stop him from receiving a dividend, till they had taken out of the joint estate what he should draw from the separate estate. Wherever my order will procure an account of the joint estate, there can be no harm; for then I should give the usual directions to apply the funds respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. But unless I can do that, every order, I can make, to let a joint creditor receive a dividend from the separate estate would carry a Chancery suit in the bosom of it, to have the joint estate brought into the fund, to prevent the separate estate from being exhausted; and I should make the order, and in the course of ten days suspend it by preventing him from receiving the dividend.

[242] Let it stand over; and if it is possible to bring it on in the course of these petitions, I should be extremely glad to have it very fully discussed.

July 28. *Attorney-General*, for the petition, proceeding to argue upon the cases, that had been cited before,* was stopped by the Court.

LORD CHANCELLOR:

I am aware of all those cases: but the difficulty, that has struck me upon it, is, that what I order here to-day, sitting in bankruptcy, I shall forbid to-morrow sitting in Chancery; for it is quite of course to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own

* [These cases are referred to in the original report as collected in Cooke's Bankruptcy Law.]

debts. The equity is so plain, that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make to prove a joint debt upon the separate estate must produce a bill in Equity. It is not fundamentally a just distribution, nor a convenient distribution; because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership; for it is money paid to one of the partners. They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved; but if they are arrested, they would pay it. It is not stated as a case, where there are no joint effects. Here it is only, that there are two funds. Their proper fund is the joint estate; and they must get as much as they can from that first. There is this singularity attending this case; that the whole transaction between them and Fry is a partnership transaction. The money was paid to one of the partners; most probably for the use of the partnership: the bill was drawn and accepted in the name of the partnership. I have no difficulty in ordering them to be admitted to prove; but not to receive a dividend. Will the assignees sue the partners in the name of the petitioners? It occurred to me, when this came on before, and no answer was given to it, that if the rule stands as you suppose, *there never would be a joint commission; [*243] but they would take out a separate commission against each partner.

The order was, that the petitioners shall be admitted, but not to receive a dividend; and that the dividend upon the proof shall be reserved, till an account is taken of what they have or might have received from the partnership effects.

1796.
July 28.

LOUGHBOROUGH, L.C.

[243]

TURNER, EX PARTE.*

(3 Vesey, 243.)

Accommodation bills upon the bankruptcy of the drawer were fully paid by the acceptors to the holder; who having a further demand under the commission proved for the whole, including the bills; he may take out of the dividend upon the bills the proportion, he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged; the rest of the dividend on the bills belongs to the acceptor.

THE petitioner had lent his name by acceptance and indorsement for the accommodation of the bankrupt, who discounted the bills so accepted or indorsed with Snaith & Co. After the bankruptcy upon the application of Snaith & Co. the petitioner paid the full value of those bills, amounting to 815*l.* 15*s.* to them. They were creditors of the bankrupt to a much larger amount, and they proved their whole demand, including the amount of the bills received from the petitioner. The petitioner prayed, that Snaith & Co. might assign to the petitioner the dividends due upon the proofs in respect of the bills, he had paid.

Ex parte Marshall, 1 Atk. 129, 131, was cited.

LORD CHANCELLOR observing, that Snaith & Co. could not be turned into trustees to the prejudice of any right, they might have, made the order, that Snaith & Co. shall take out of the dividend upon the 815*l.* 15*s.*, so much, as would make up the proportion, which they would have received upon the residue of the debt proved beyond the 815*l.* 15*s.*, if that debt of 815*l.* 15*s.* had been expunged; and the rest of the dividend upon the 815*l.* 15*s.* be paid to the petitioner; and that the dividend shall remain in the hands of the assignees, till it shall appear, what proportion Snaith & Co. are entitled to.

* *Gray* v. *Seckham* (1872) L. R. 7 Ch. 680; 42 L. J. Ch. 127.

DAVENPORT *v.* HANBURY.

(3 Vesey, 257—260.)

1796.
Nov. 17 & 21.

Rolls Court.
ARDEN, M.R.
[257]

Under a legacy to the issue of A., all descendants are entitled, and take *per capita* as joint-tenants.

"Equally" makes a tenancy in common.

THIS cause arose upon a legacy to Mary Davenport or her issue.

Mary Davenport died in the life of the testator. She left only one child living, a son; and two grandchildren, the children of a deceased daughter.

Two questions were made: 1st, Whether the grandchildren were entitled with the son: if so, 2ndly, Whether they should take *per capita* or *per stirpes:*

MASTER OF THE ROLLS:

This depends entirely upon the construction of the word "issue." *Wythe* v. *Thurston*, Amb. 555, was *quoted. I have sent [*258] for the Registrar's Book, and shall not make my decree now, but will only state, that the report is not quite accurate as to the words. That case determines, that the word "issue" admits all the issue of the person, to whose issue the gift is made: but whether they were to take *per capita* or *per stirpes* may depend possibly upon the words, and not determine the point before me. Lord HARDWICKE's decree fully establishes, that "issue" includes all the descendants. I will state the words in that case, as they really are. It is in the Registrar's Book of 1748 by the name of *Wythe* v. *Blackman;* and was upon a deed, not by will, as this is. The trust was, that the trustees should sell the said settled premises, as soon as conveniently might be; and that the money thereby arising, together with the mesne profits of the said premises, should be equally divided between the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, or the respectives issues of their bodies, in case they or either of them the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, should be dead at such time, as there should happen to be a failure of issue male of

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DAVENPORT v. HANBURY.

John Thurston the younger, share and share alike: to wit, to each of them or their respective children one-fourth part thereof; and in the said indenture was contained a proviso, that if any of them, the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, should happen to be dead without issue at such time, as there should happen to be a failue of issue male of the said John Thurston, then the money should be equally divided between the survivors of them the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, or their respective children, in case any of them be then dead, leaving issue of their bodies.

The trust therefore was for those four persons, or the respective issues of their bodies. It does seem, that Lord HARDWICKE divided it *per capita* among themselves; making stocks of the four sisters. But the words in that case are very different from those in this. Here it is contended, that the son shall take all; or if not, half: but it is clear, the grandchildren are to take: the only doubt is, whether they shall take *per capita* or *per stirpes*. That is a matter, I shall not determine now. I am rather inclined to think, Lord HARDWICKE's distribution arose from the particular [*259] words of the *deed. I shall examine that decree very strictly, before I decide that they are to take otherwise than as joint-tenants of this fund.

Nov. 21.

MASTER OF THE ROLLS:

This cause depends entirely upon the construction of these words "to Mary Davenport or her issue." I apprehend, there is no doubt, that the word "issue" has ever been considered as embracing other objects than children; and the only remaining question is, whether they are to take *per capita* or *per stirpes*. It was contended, that though that embraces all, they shall not take *per capita;* but the fund must be divided according to the stocks, from which they are derived; and for that purpose *Wythe* v. *Thurston* was cited as a decision by Lord HARDWICKE, that under similar words "issue" was held to comprehend all the descendants; but they were to take *per stirpes*. It is very shortly reported by Ambler; therefore I thought it necessary to look very accurately into the Registrar's book; from which I stated the case,

when this cause came on before. When that is considered, the authority of that case does not in any degree militate against my opinion; and I repeat it, that it may not be supposed Lord HARDWICKE meant to lay down, that the word "issue" would not comprehend all the descendants, and that they would not all take either as joint-tenants; or if the words "equally to be divided" were added, as tenants in common. It was upon the particular words of that case, that Lord HARDWICKE confined the distribution to their rights *per stirpes*. That case was followed by *Gale* v. *Bennett*, Amb. 681; in which Lord NORTHINGTON relied much upon the former decision. In those two cases Lords HARDWICKE and NORTHINGTON were of opinion, that all the issue should take; but not *per capita*, but *per stirpes:* but those determinations arose from the peculiar words giving the fund first to the children, then, in failure of all issue, over to third persons. That leaves the question as to the import of the word "issue" exactly, as if those cases were not determined; and I am now to determine upon the word "issue." When used as a word of purchase, it has been always considered as synonymous to and the same as "descendants;" and whoever can make himself out a descendant of the person, to whose issue the bequest is made, has a right to be considered as *persona designata* in that bequest. The very case occurred before Lord Thurlow: *Butler* v. *Stratton*, 3 Bro. C. C. 367: where upon the word *"equally" they were held entitled in [*260] common; therefore I must suppose, if the word "equally" had not been added, they would have taken as joint-tenants.

The word "issue," therefore, there being no particular words in this will, as there were in the two cases before Lord Hardwicke and Lord Northington, embraces all the descendants; and as there are no words of severance, nor any thing to shew, he meant they should take, not in their own rights, but as representing others, the son and the children of the daughter must be considered as *personæ designatæ*, and will take as joint-tenants.

In *Butler* v. *Stratton* were cited *Thomas* v. *Hole*, For. 251, and *Phillips* v. *Garth*, before Mr. Justice Buller, 3 Bro. C. C. 64; and they are according to my opinion. The latter was upon the words "next of kin." Lord THURLOW did not doubt the principle, that they must take *per capita*, if intended; but doubted, whether

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those descendants from the next of kin were not excluded under those words. But I do not find any where, but that "issue" is a word of purchase, and embraces all descendants.

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DANIEL *v.* CROSS.

(3 Vesey, 277—279.)

Bankers upon a deposit of money with them gave notes bearing interest. The partnership was dissolved. One of the partners soon afterwards died; and his creditors were called by advertisement. Another partnership was formed by the survivors and others; who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, when they failed. The assets of the deceased partner are not discharged.

CROSS the elder, Cross the younger, and Bailey, were in partnership as bankers at Bath. In March, 1791, the partnership was dissolved; and in June, Cross the elder died. By his will he subjected his real estate to his debts. After his death an advertisement was published, calling upon his creditors to send in the particulars of their demands to his executrix. In the same year a new partnership was formed by the surviving partners and other persons; which continued till March, 1793; when a commission of bankruptcy issued against them.

The plaintiffs were creditors of the old partnership by notes issued in 1790 for money paid into the bank. These notes were made payable a certain number of days after sight: but it was understood, that they were to remain a longer time; and they bore an interest of 3½ per cent. The interest upon these notes had been paid by the new partnership; and they had re-issued several of the common cash notes of the former partnership. The debts of the old partnership, at the dissolution, amounted to 197,000*l.* Their effects and money due to them were calculated at 203,000*l.*

[278] The question was, whether the estate of Cross the elder was liable to the plaintiffs in respect of their deposit notes.

Solicitor-General, for the plaintiffs:

Lane v. *Williams*, 2 Vern. 277, 292; *Heath* v. *Percival*,

1 P. Will. 682; *Jacomb* v. *Harwood*, 2 Ves. 265. In *Jones* v. *Sutton*, Chan. before Lord Hardwicke, 2nd of January, 1753, MSS. after the death of one partner another was taken in, and the debts were carried into the new partnership: the decision recognizes the distinction; that to relieve the estate of the deceased partner from debts of this nature it is absolutely necessary, that the notes should be called in and delivered up, unless a prodigious length of time has elapsed.

Mr. Mansfield and *Mr. Richards*, for the defendants:

Another partnership having been established, and having paid interest upon these notes, and re-issued notes given by the former partnership, the attempt to charge the estate of a former partner is new. When he died, the old partnership was solvent. The dissolution became by his death notorious to all the world. The plaintiffs never thought of making a demand when the advertisement appeared upon the death of Cross; and they dealt with the new partnership. This is not like the case of a bond or an express engagement by two partners. *Lane* v. *Williams* is a very short note: there was no new partnership or new credit given. In *Heath* v. *Percival* there was a joint and several bond. In *Jacomb* v. *Harwood* the interest was paid by the representative of the deceased partner.* In *Jones* v. *Sutton* Lord HARDWICKE relies upon the circumstance, that the surviving partner was executor of the deceased partner, and the interest was paid by him. If the persons interested in the estate of Cross knew these notes were out, they must have supposed the claim abandoned. The new house took upon them the debts of the old; paying interest to the plaintiffs, and renewing the cash notes from time to time.

Reply:

The interest might have been paid by the new firm as agents of the old firm. As to their solvency at the dissolution, the debts nearly equalled the amount of their effects; and *non constat*, that all the money due to them could be recovered.

* The surviving partner was one of the executors; and the interest was paid by him.

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LORD CHANCELLOR:

These notes I take to be securities for money borrowed by the partners: † then how can receipt of interest from the surviving partner, no matter whether a new partnership or not, discharge the estate of the deceased partner? I do not apprehend, they could come upon the new partnership, or that the creditors of the new partnership would permit them. They come quite regularly upon the assets of Cross possessed by the new partnership, and upon his general assets. They are creditors upon the effects of the old partnership, not upon the effects of the new partnership. The effects of the old partnership are the effects of Cross, and part of the effects of the new partnership. Cross's assets can never be discharged from this demand.

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Rolls Court.
ARDEN, M.R.
[295]

BAYNHAM *v.* GUY'S HOSPITAL.

(3 Vesey, 295—299.)

Right of renewal forfeited by the laches of the tenant. The Court leans against a construction for perpetual renewal, unless clearly intended. A legal instrument is not to be construed by the acts of the parties.

BY indenture, dated the 10th of May, 1725, the Marquis of Carnarvon in consideration of 319*l.* 10*s.* demised to Thomas Landon, his executors, administrators and assigns, certain premises situate in Stretton in the county of Hereford; to hold unto Landon, his executors, &c. for 99 years, if Thomas Landon the younger, Mary Landon the younger, son and daughter of the said Thomas Landon by Mary, his wife, and Richard Eikley, or any or either of them, should so long live, under the yearly rent of 10*l.* That indendure contained the following covenant:

"And the said Lord Carnarvon for the considerations aforesaid and for the better encouragement of husbandry and improvement of the said lands and premises doth for himself his heirs and assigns covenant promise and agree to and with the said Thomas Landon his executors and administrators that he the said Lord

† The counsel for the defendant admitted, that in effect it came to a loan.

Carnarvon his heirs and assigns shall and will from time to time and at all times hereafter at the request costs and charges in the law of the said Thomas Landon his executors or administrators when and as often and within two years to be computed from the day next after the death of the first or any or either of the life or lives by which the said premises are shall or may be held and enjoyed shall happen to die renew and make a new lease or leases to him the said Thomas Landon his executors or administrators or any or either of them of the said messuages or tenements lands and premises hereinbefore demised to commence from the expiration of these presents and at and under the yearly rents and covenants hereinbefore reserved for one life or 99 years determinable upon such life the said Thomas Landon his executors or administrators paying or allowing for a fine income or consideration for every such life to be added the sum of 53*l.* 5*s.* of lawful money and so as often and in course one after the other as any of the life or lives in being or any future life or lives shall as before agreed to be renewed die or depart this life Provided such fine or fines be paid or tendered to be paid unto the said Lord Carnarvon his heirs or assigns within two years to be computed from the day next and immediately after the death or decease of any or either of the life or lives thentofore in being and so dying as aforesaid *and as often as one life or lives whereby [*296] the said demised premises shall be held and enjoyed shall die or depart this life Provided always and further it is agreed upon by and between the said parties to these presents and it is the true intent and meaning hereof and of the parties hereunto that if upon or after the death of any of the life or lives hereinbefore named the said Thomas Landon his executors or administrators shall refuse or neglect to renew the said lease or make application therein or to act in and name one other life or lives in the place and stead of any life or lives dying over and above and more than the time and space of two years as aforesaid and thereby also neglect or refuse tender of such new lease and to pay unto or tender to or for the use of the said Lord Carnarvon his heirs or assigns the sum of 53*l.* 5*s.* of lawful money for a fine for such life or consideration for every life to be hereinafter added at or in the church porch of the parish church of Stretton aforesaid and

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thereof give ten days notice in writing unto the said Lord Carnarvon his heirs or assigns or agents for the time being of such his or their intention and tender then this indenture of lease and every article clause and thing herein contained shall cease determine and be utterly void and of none effect."

After the execution of the lease Lord Carnarvon conveyed the demised premises in fee-simple to the president and governors of Guy's Hospital, subject to the lease; and soon afterwards died. Thomas Landon, the lessee, enjoyed the estate under the lease till his death about the year 1731; and by his will, dated the 11th of April, 1731, he gave it to his son and daughter, Thomas and Mary Landon, to be equally divided between them. Thomas Landon, the son, died many years ago unmarried. Mary Landon, his sister, married George Baynham, and died in 1775; leaving her husband and Anthony and Lucy Baynham, their children, surviving. Anthony Baynham obtained letters of administration to his father, and died. Richard Eikley, the surviving life in the lease, died on the 3rd of October, 1785. Lucy Baynham obtained letters of administration with the will annexed to Thomas Landon, the elder. She also obtained administration to Thomas Landon, the son, and to her mother Mary Baynham and administration *de bonis non* to her father George Baynham.

No application having been made for renewal of the lease previous to August, 1786, and no step having been taken in [*297] *consequence of that neglect, Lucy Baynham caused a written notice according to the provisions of the lease, dated on the 4th of August, 1786, to attend in the church porch for that purpose on the 21st to be fixed on the door of the church of Stretton. She also caused a copy of the notice to be served upon the agent for the hospital; who upon the death of Eikley procured the tenants to attorn, and received the rents and profits of the premises.

Lucy Baynham attended according to the notice; but no person attending for the hospital, and her applications for renewal being rejected, she filed the bill, praying, that the defendants should be decreed to grant a new lease upon payment of such fine and upon such terms as to the Court should seem just and reasonable.

Mr. Graham and *Mr. Short*, for the plaintiff:

The decisions by the House of Lords upon the late cases from Ireland seem to incline against the renewal of these leases: *Vipon* v. *Rowley*, 1774; *Kam* v. *Hamilton*, 1776; *Bateman* v. *Murray*, 1779: but in this case the plaintiff is entitled by express words to renewal, whenever any life or lives shall drop; and the delay arises from poverty. In *Lord Ross* v. *Worsop*, 4 Bro. P. C. 411, and *Rawstorne* v. *Bentley*, 4 Bro. C. C. 415, a renewal was decreed. Where one part of a covenant is in opposition to another, and they cannot be reconciled, upon the principle of the construction of deeds the former ought to stand, and the latter to be rejected.

Mr. Lloyd and *Mr. Stanley*, for the defendants, were stopped by the Court.

MASTER OF THE ROLLS:

I shall lay the Irish cases out of the question. They went upon what Lord LIFFORD calls a local equity. They had gone on upon the idea, that a renewal might be claimed at any distance of time. Lord THURLOW upon the appeal to the House of Lords in *Bateman* v. *Murray* disavowed that; and said, he could not sitting here administer an equity, which did not arise upon the case; and the decree made in Ireland was reversed; upon which an Act of Parliament was procured in Ireland to put an end to it. You will see a very elaborate judgment of Lord LIFFORD's in Vernon and Scriven's Reports.*

I strongly protest against the argument used by the learned judges in *Cooke* v. *Booth*, Cowp. 819, as to construing a legal instrument by the equivocal acts of the parties and their understanding upon it; which I will never allow to affect my mind. That case was sent to law by Lord BATHURST. The learned judges thought fit to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground, that by voluntary acts, which the parties might or might not have done, the parties themselves have put a construction upon it. [298]

* *Boyle* v. *Lysaght*, and *Magrath* v. *Lord Muskerry*, Vernon and Scriven's Reports, 135, 166.

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Mr. Justice WILLES stated that as his only ground. Lord MANSFIELD made it his chief ground: but that ground was disapproved by Lord THURLOW; and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed; and Mr. Justice WILSON, who argued it with me, was astonished at it. When it came back, Lord BATHURST not having retained the Great Seal long enough for it to come again before him, it came before Lord THURLOW, who said, that sitting as Chancellor when he asked the opinion of a court of law, whatever his own opinion might be, he was bound by that of the court of law; therefore he decreed a renewal; but said, he should be very glad, if Mr. Booth would carry it to a superior tribunal. We had a consultation; and I wrote to Mr. Booth upon it: but he being only a tenant for life, refused to appeal. There stands the case of *Cooke* v. *Booth*. I see I have put a note to that case, referring to *Tritton* v. *Foote*, 2 Bro. C. C. 636; which is a positive determination against the claim. I collect therefore from these cases this; that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear, that the covenant does mean it. *Furnival* v. *Crewe*, 3 Atk. 83, which is relied on in *Cooke* v. *Booth*, had clear words for a perpetual renewal; which made it impossible to construe it otherwise.

In this case how could it be upon the death of the first life at "the expiration of these presents?" Those are extraordinary words. The construction for the plaintiff is, that the lessor will renew, whenever any life or lives shall drop; that it does not say, that if they come at the end of the third life they may not have a renewal. I admit it upon that clause: but see the proviso that follows; that if upon or after the death of any of [*299] the life or lives *the said Thomas Landon, his executors, &c. shall refuse or neglect to renew, &c. Whatever doubt there may be upon the first part, there can be none upon this clause; unless it is argued, that Lord Carnarvon not taking advantage of it proves, that he did not understand it so: but I lay out of the case the conduct of the party not availing himself of that clause. I cannot argue, as the Court of King's Bench did in *Cooke* v. *Booth*; and am clearly of opinion, the lessee has not

entitled himself to the benefit of the covenant; and they might, if they pleased, have ejected him for not applying, when the first life dropped. Therefore the right of renewal is forfeited; the plaintiff has no claim here; and the bill must be dismissed.

K. B. MICHAELMAS TERM.

1794.
Nov. 10.

[12]

RUSSELL AND OTHERS *v.* HANKEY AND OTHERS.

(6 T. R. 12—13.)

A banker in London receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment is not guilty of negligence in giving up such bills to the acceptor upon receiving a cheque upon a banker for the amount, although it turn out that such cheque is dishonoured.

THE first count in this case stated that in consideration that the plaintiffs had delivered to the defendants three bills of exchange, in order that the defendants might procure payment of the sums of money therein mentioned, the defendants promised to use their endeavours to procure payment thereof, and account to the plaintiffs for what they should receive, and in case the bills should be dishonoured to deliver them back to the plaintiffs. It then stated as a breach that the bills were dishonoured, but that the defendants did not deliver them back. Another count (the third) was upon a promise by the defendants to take care of the bills so long as the defendants should be entrusted with them, and to keep and preserve them for the plaintiffs' use. Another count, (the 5th) laid the promise to be, that if the bills should be unpaid, the defendants would safely keep and take due care of them, so that they should not be lost through the negligence or default of the defendants. There were other counts for money had and received, and money paid.

At the trial before Lord Kenyon at Guildhall, the facts were stated to be these; that the defendants were bankers in London in correspondence with the plaintiffs, their customers in the country. That the bills in question, which had been indorsed to the plaintiffs in the course of negotiation had been transmitted by them to the defendants in order to obtain payment from the acceptor, who resided in London, and to carry the amount to the

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RUSSELL v. HANKEY.
[*13]

account of the plaintiffs. That *the defendants accordingly tendered the bills to the acceptor for payment, when he gave them a cheque upon a banker in London for the amount upon the receipt of which cheque they delivered up to the acceptor the bills in question. It turned out that the cheque was dishonoured, the person on whom it was drawn having no account with the drawer. Upon these facts, which were not disputed, the plaintiffs contended that the defendants had been guilty of negligence in giving up the bills for the cheque they had received in payment, without previously enquiring whether or not the cheque would be honoured. The defendants on the other hand insisted that they had only done what was usual in the ordinary course of trade and business of bankers, and therefore ought not to be answerable for the event; and Lord KENYON being clearly of the latter opinion, the plaintiffs were nonsuited.

Erskine now moved to set aside the nonsuit upon the ground before stated. But

Per CURIAM:

We dare not even grant a rule to shew cause, as it would be putting the whole trade of London in suspense pending it. There is no ground to impute negligence to the defendants.

Rule refused.

1794.
Nov. 11.
[14]

KIRKMAN AND ANOTHER, ASSIGNEES OF WALKER, A BANKRUPT, *v.* SHAWCROSS.

(6 T. R. 14—19.)

An agreement entered into by a number of dyers, dressers, bleachers, &c., at a public meeting, that they would not receive any more goods to be dyed, &c. &c. but on condition that they should respectively have a lien on those goods for their general balance, is good in law; and any one, who after notice of it delivers goods to either of those persons, must be taken to have assented to those terms, and consequently cannot demand goods so delivered to any such dyer, &c. without paying the balance of his general account.

IN trover for a quantity of yarn, which was tried at the last assizes at Lancaster before Heath, J., a verdict was found for the plaintiff, subject to the opinion of this Court on a special

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case. On 14th August, 1792, the yarn in question was delivered by Walker, who was a fustian manufacturer at Thatchleach in Lancashire, to the defendant, a bleacher in the neighbourhood of Manchester, for the purpose of being bleached by him; the yarn was accordingly bleached; after which Walker committed an act of bankruptcy, and a commission issued against him, dated 30th October, 1792, under which the plaintiffs claim. Before the commencement of the present action the plaintiffs tendered to the defendant the money due to him for the bleaching of the yarn in question, and demanded the yarn, which was refused. Before and at the time of the bankruptcy, the bankrupt was indebted to the defendant in 59*l.* and upwards for the bleaching of other yarn by the defendant, which money remained due, but the yarn so bleached had been delivered to the bankrupt before the bankruptcy. At a meeting of the dyers, dressers, whisters, printers, and calenderers of Manchester, and the neighbourhood, held at Manchester, in April, 1788, certain resolutions were adopted in a writing, signed, sealed, and delivered, amongst others by the defendant; stating that "whereas a doubt had arisen whether dyers, dressers, bleachers, whisters, printers, or calenderers had a right [*15] to detain goods delivered to them, not only *till payment were made for the work and labour performed upon the particular grounds [*sc.* goods] detained, but also for work and labour of the same kind performed upon goods already delivered out of the possession of such dyer, &c. they, the under-mentioned persons, being either dyers, dressers, bleachers, &c. thereby gave public notice that they would never thenceforward take into their possession any goods to be dyed, dressed, bleached, &c. unless under express condition that the goods so delivered to them for the purpose of being bleached, &c. should not only be subject to the debt due for the work and labour performed upon them, but also for the general balance due from the persons employing them for work and labour of the same kind, performed upon goods which they had already delivered out of their possession;" and it ended with a desire to all persons meaning to employ them to take notice of the same. There were other resolutions empowering some of the body to act for the rest in carrying the above into

effect; and entering into an agreement with each other for that purpose. The case then stated that pursuant to the above resolutions an advertisement or notice was inserted in the Manchester newspapers on 20th May, 1788, and on several days afterwards; on one of which days the defendant's name appeared signed thereto, and such advertisement was to the same purport as the resolution mentioned. These advertisements were seen and read by the bankrupt at the time of their publication; and he thereby received notice of their contents. The question submitted to the Court was, whether the defendant had a lien or right to detain the yarn in question for what remained due to him for his work and labour upon the yarn delivered to the bankrupt before the bankruptcy; if he had, then a nonsuit was to be entered; if not, then a verdict to be entered for the value of the goods, deducting the price of bleaching them.

Chambre for the plaintiff:

[It would be contrary to public policy to allow combinations, such as that between the defendant and others in the same industry, to alter the general rule of law. If this were allowed it would be competent for carriers and inn-keepers to combine so as to evade the obligations the law lays upon them. It has indeed been held competent to carriers to stipulate for a reward to compensate him for the risk; but not to alter their responsibility in regard to the risk itself. The combination in the present case is a direct attempt to defeat the policy of the law by extending the operations of liens, and it is the more dangerous from the manner in which it is endeavoured to be carried into effect.]

LORD KENYON, Ch. J. (stopping *Heywood*, Serjt. who was to have argued on the other side): [16]

This case seems perfectly clear, whether it be considered on the grounds of honesty or public policy; since the only question is, whether a party, who has entered into an agreement, which is neither *contra bonos mores* or forbidden by any law, shall or shall not be bound by it. The defendant in this case is a bleacher in

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[*17]

the county of Lancashire, and one of a great body of persons there, who, having found that losses to a considerable amount were incurred by them from their not being entitled to retaining goods put into their hands for a *general balance, came to an agreement (for it was in their option either to work for this or that person as they chose, which is a point to be remembered in the sequel,) that they would not receive the goods of any person who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement was promulgated all round the neighbouring country; and it is stated as a fact in the case that it came to the knowledge of the bankrupt. Then the bankrupt knowing it must be taken to have sent his goods to the defendant on the terms specified in this agreement, and his assignees must be bound by it. But it has been contended that, though any one individual may impose such terms on his customers as are mentioned in this general agreement, it is not competent to a class of men to do it. But it seems to me that that is a distinction without a difference; there is no reason why a body of persons should not make such an agreement as (it is admitted) the defendant himself might have made. In every case that has occurred, and in which the question of liens has arisen, it has been the universal wish of the courts at all times to extend the lien as far as possible. In those which came before Lord MANSFIELD he thought that justice required it: but he sometimes found that the rules of law were against it, and therefore he submitted, because in those cases the rigid rules of law were against the lien. But we are now desired to abrogate an agreement which the parties themselves have made, and which the Courts have said that justice requires; and it is said that, unless we do so, the inn-keepers will enter into similar resolutions. But their case is widely different from the present; for they are bound by law to receive guests who come to their inns, and are also bound to protect the property of those guests. They have no option either to receive or reject guests; therefore I said it was a material circumstance in the present case that these persons had an option either to work or not as they pleased. The case of the inn-keepers does not bear any resemblance to the present; for as they cannot

refuse to receive guests, so neither can they impose unreasonable terms on them. The case of carriers has also been mentioned: but that is not like this. They have no right to say they will not receive any goods but on their own terms; I *believe there is an Act of Parliament † giving power to the justices at the Quarter Sessions to regulate the price of the carriage of goods. But be that as it may, when a carrier has given notice that he would not be answerable for goods of a particular denomination unless he received a certain premium, and that notice has come to the knowledge of a party suing, the Courts have considered it as an agreement binding on both parties. In most of the cases where it has been determined that the party had no lien, the difficulty arose from the general law not creating a lien in that instance, or from the want of an agreement that the party should have a lien: but in this case there is an express agreement between the parties that the defendant should have a lien for his general balance; that agreement, so far from being illegal, is founded on justice, and therefore it is binding on the plaintiffs.

ASHHURST, J.:

There is no reason why the resolutions made by the different manufacturers should not be considered as engrafted upon the agreement between the bankrupt and the defendant for the bleaching of the goods of the former by the mutual consent of both. It appears that the defendant was one of the persons who signed these resolutions; and it is stated in the case that the bankrupt knew that fact before he sent his goods to the defendant, and therefore it must now be taken for granted that he assented to the terms contained in the printed papers. With regard to the legality of such an agreement; instead of its being against law, it is very beneficial, for it is in favour of the justice of the case. And this will not affect the case of the inn-keepers, because the law has fixed an indelible obligation upon them to receive their guests.

GROSE, J.:

The doctrine of liens was very fully discussed in the case of

† *Vide* 3 W. & M. c. 12, and 21 Geo. II. c. 28.

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Green v. *Farmer* † by Lord MANSFIELD, who, lamenting that he was obliged to decide against the lien in that case, said "the convenience of commerce and natural justice are on the side of liens, and therefore of late years *Courts lean that way; 1st, Where there is an express contract; 2ndly, Where it is implied from the usage of trade; 3rdly, From the manner of dealing between the parties in the particular case; or 4thly, Where the defendant has acted as a factor." It is said however that though there was an agreement between the parties in this case, that the defendant should have a lien for his general balance, the agreement itself is illegal, and that on that account the defendant ought not to have the benefit of it. But consider what is the nature of this agreement, not forgetting the general law respecting liens: its object is merely to enforce that which the law considers as equitable. The different manufacturers in the neighbourhood of Manchester, having seen the injustice and hardship of their situation, from not being entitled to detain goods deposited with them until the balance due to them was paid, entered into this agreement; and it seems to me that the agreement was only to enforce that which justice and honesty required. Then the bankrupt, knowing this, sent the goods in question to the defendant: but on what terms did he send them? On the terms on which the manufacturers had agreed to receive goods, for the bankrupt must be taken to have assented to those terms.

LAWRENCE, J.:

It is admitted that this agreement might have been lawfully made between A. and B., but it is objected to as illegal, because made by a body of men. Now it is laid down in the case in Burrow that liens are for the convenience of commerce, and that they are on the side of natural justice. And the question here is whether an agreement, which is on the side of natural justice, be or be not illegal, it having been made by a number of persons. But I cannot say that it is illegal, when it is supported on such a foundation; and if it be not illegal, it must be binding upon the parties.

Per CURIAM: *Judgment of nonsuit.*

† 4 Burr. 2220.

RAPHAEL BRANDON *v.* NESBITT.

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(6 T. R. 23—28.)

[23]

No action can be maintained either by, or in favour of, an alien enemy. Therefore a plea of alienage, to an action on a policy of insurance brought in the name of an English agent for his principal an alien, such interest appearing on the record, is a good plea; and a replication to such a plea that the alien is indebted to the agent (the plaintiff) in more money than the value of the property insured cannot be supported.

THIS was an action on a policy of insurance on goods on board the *Greyhound*, an American ship, at and from London to Bayonne; there was an averment in the declaration that the policy was effected for the benefit and on the account of David Brandon, Isaac and David Valery, Samuel and Moyza D'Abraham Nunes, Castro Leon & Co. Solomon David and Joshua Brandon, and N. Pimental & Co. who were interested in the goods; and another averment that the ship was captured as prize. The defendant pleaded that "the persons interested in the goods were aliens born in foreign parts, to wit at Bayonne in France, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign Sovereign, to wit, the French King;" that before the ship sailed, a public and open war commenced and was carried on between our king and the persons exercising the powers of government in France, and that the persons interested were inhabiting and commorant in France under the government of the persons exercising the powers of government in France, and that they are enemies of our king, and adhering to the king's enemies, &c. * * The replication stated that the persons interested in the insurance were before the commencement of the war, and at the commencement of the suit, severally and respectively indebted to the plaintiff in *divers sums of money exceeding the respective interests of those persons in the goods insured, specifying what sum was due to the plaintiff from each of those persons respectively. * * To this replication there was a general demurrer, and joinder in demurrer.

[*24]

[*Wood* in support of the demurrer, commenced by an argument to shew that his plea was good.] It is a good plea in

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bar to the action (and not merely a plea in abatement) to say that the plaintiff who brings the action is an alien born, and at enmity with the King. Lit. sect. 196, 198; Co. Lit. 127*b*, 129*b*; Dy. 2*b*; Gilb. Hist. C. B. 205; 1 Bac. Abr. p. 4; Comb. 212, 394; *Wells* v. *Williams*, Salk. 46; and 1 Lord Raym. 282; 1 Com. Dig. "Abatement," (E. 4). This plea is founded on good policy; it is to prevent the property sued for being carried out of this country to enrich the enemy. Now the persons who are interested in the goods insured, and whose interest is stated in the declaration as the foundation of the action, are in reality the plaintiffs in this case, because it there appears that the plaintiff sues for their benefit; and, as far as respects this question, it is immaterial whether they sue in their own name or in that of their agent. It was necessary that the agent should bring the action in his name, because the contract of insurance was formerly made by him, and it was necessary to aver that these parties were interested, because the contract of insurance was substantially made with them. But if they cannot maintain an action in their own names, on account of their alienage, neither can they in the name of their trustee: if the law will not permit them to sue directly, they cannot effect the same thing indirectly. [If the plea be good, the next question is, whether there be anything contained in the replication to avoid its effect.]

[*25] *It will be contended, on behalf of the plaintiff, that he has a lien on the goods which were the subject of insurance: but, unless the principal himself can make a good title to the property, no other person can have a lien upon it on his account. The agent cannot have a better title than his principal; and it has been shewn that the principal in this case has none. And if the replication mean to assert that the plaintiff himself has an insurable interest in the goods, then the replication is bad, because it is a departure from the declaration which avers the interest to be in the principal. * * *

Giles, contrà:

It may be admitted that the plea of alien born is a plea in bar, though it is to be observed that it was said in *Wells* v. *Williams* †

† 1 Lord Raym. 283.

that it is a plea not to be favoured. But there is no instance, in which such a plea has been pleaded, imputing the disability to a third person, who is not the plaintiff on the record; in all the cases the disability has been imputed to the party who contracts. In the case of an executor indeed, it may be pleaded that the testator was an alien enemy, but the executor is considered as *the [*26] legal representative of the testator, and as the person to whom the benefit of the contract is by law transferred. But the Court will not take notice of beneficial interests in other persons than the plaintiff, in order to work injustice; and here the parties interested in the goods, and to whom the disability of suing is imputed, were not the contracting parties. And though in *Winch* v. *Keeley* † the Court took notice of the *cestui que trust*, that was done in order to prevent injustice; whereas if it be done here, it will be to work injustice. But even if the Court can take notice of the beneficial interests of these persons, and consider them as the real plaintiffs in the action, still this plea of alienage is bad, being pleaded to a contract of insurance. At the time when this contract was entered into, which was before the passing of the stat. 33 Geo. III. c. 27, the insurance of enemy's property even in time of war was not illegal.‡ Then if it were a legal contract, the law will provide the parties with a remedy by action to enforce it. And therefore whether the alien in such a case sue in his own name, or in that of his agent, the plea of his being an alien born cannot be set up as a legal bar to the action. An alien in league may buy and sell here, and may maintain a personal action: Co. Lit. 129, *b*. If however the Court should be of opinion that the plea can be supported, the replication gives a sufficient answer to it. The plea does not state that the plaintiff who made the contract, was an alien born, and is thus disabled from suing, but that other persons, who are beneficially interested in the goods, are aliens: but the replication discloses an opposing equity to the equity relied upon by the defendant in his plea. And this shews that there is no impolicy in permitting the plaintiff to recover, because the money, which it is the object of this action to recover, when recovered will not go out of the

† 1 T. R. 619.

‡ See *Mr. Giles's* argument on this subject in *Bristow* v. *Towers*, 6 T. R. 37.

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kingdom (as was supposed) to strengthen the hands of the enemy, but will be retained here by the plaintiff by way of set off. As to the plea of alien born being founded on the ground that the property of the enemy is forfeited to the crown, it is said in Dy. 2, *b*, that the reason of this plea is that "being an enemy of the king, he shall not have the benefit of the law." Now if the replication be supported, that reason will not hold in the present case; for it is the plaintiff, not the aliens, who prays [*27] *the benefit of the law in this action. Besides these goods are not forfeited to the crown: no property vests in the crown till found by inquisition (Park. Rep. 267), and if peace should be made before inquest taken, there will be no forfeiture at all. *Ib.* * * *

Wood in reply:

It is not true, as a general position, that this Court will not take notice of the beneficial interests of third persons. *Bottomly* v. *Brook*, *Rudge* v. *Birch*, and *Webster* v. *Scales*; cited in *Winch* v. *Keeley*, 1 T. R. 621, 622. This action is to all intents and purposes the action of alien enemies: it is so stated; and unless the plaintiff can support their interest, he cannot sue at all. The objection therefore goes to the foundation of the interest of the plaintiff himself; for he avers an interest in persons who by law can have none. The cases, in which it has been held that policies of insurance on the goods of an enemy are legal, are either those where the goods were going from one port of the enemy to another, or from a neutral port to an enemy's port; but there is no case, in which it has been directly held that a policy of insurance on enemy's property from this country to the enemy's country is good. * * *

[28] This case stood over for a second argument: but the plaintiff's counsel intimating to the Court this day that the parties did not wish a further argument,

Lord KENYON, C. J. said that the Court had considered this case; and unless any thing more could be urged at the bar to shake the opinion they had formed, they were of opinion that

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judgment must be given for the defendant on this ground, that an action will not lie either by or in favour of an alien enemy. That the case of *Anthon* v. *Fisher*,* which was argued in this Court, and upon which judgment was given here for the plaintiff *pro formâ*, in order to give an opportunity of bringing a writ of error, (the judges of this Court being divided in opinion), and which judgment was afterwards reversed in the Exchequer Chamber,† proceeded on the same principle. That they had not found a single case, in which the action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettingham*‡ that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection.

Judgment for the defendant.§

DOE, ON THE DEMISE OF DAVY, *v.* BURNSALL.

(6 T. R. 30—35.)

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[30]

Devise of "all the devisor's estates to A. and the issue of her body, as tenants in common, but in default of such issue, or being such if they should all die under twenty-one and without leaving issue," then over: held, that all the limitations subsequent to that to A. were contingent, and were consequently destroyed by a recovery suffered by A. ‖

THIS was an ejectment to recover the possession of certain freehold premises in the declaration mentioned, which was tried at the sittings after Easter term last, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

David Burnsall, being seised in fee of the premises in question,

* Dougl. 648, n. 1.

† Ibm. 649, n. 132.

‡ 3 Burr. 1734; and 1 Bl. Rep. 563.

§ When the case of *Bristow* v. *Towers*, 6 T. R. 35, was mentioned a few days afterwards, Lord KENYON said, the more they thought of this subject, the more strongly were they convinced of the propriety of this determination.

‖ See a similar decision on the same will in *Burnsall* v. *Davy*, 1 B. & P. 215; and, cases where the decision has been followed—*Denman* v. *Jones* (1867) 16 L. T. N. S. 788, and *In re Moyle's estate* (1878) 1 L. R. Ir. 155.—R. C.

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and being also possessed of several leasehold estates, by will dated 26th November, 1791, properly attested, devised "all his freehold and leasehold estates, and all other his estates whatsoever both real and personal, subject and chargeable respectively with certain annuities therein mentioned, and a life estate to his wife in a certain part thereof, (after payment and discharge of all his debts, legacies, and funeral and testamentary charges and expenses in and about executing his will), unto his niece Mary Owstwick otherwise Ellard, and the issue of her body lawfully to be begotten, as tenants in common (if more than one); but in default of such issue, or being such, if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies, then he devised the same unto his cousin Peter Davy, and the issue of his body lawfully to be begotten, as tenants in common (if more than one); but in default of such issue, or being such, if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies, or in case neither he nor any such his lawful issue (if any) should take upon himself or themselves the surname of Burnsall, by virtue of an Act of Parliament, &c. within two years, &c. that then and in either of such cases happening, the same estates and property should actually go, and he for that purpose thereby gave, devised, and bequeathed the same to S. Ganton, his heirs, executors, and administrators, for ever, &c." And the devisor thereby gave power to Mary [*31] Owstwick *otherwise Ellard during her life, and to P. Davy during his life, when and as they should respectively come in to and be in the actual possession of the estates, to grant building leases not exceeding 70 years, and other leases where it might not be necessary to build, not exceeding twenty-one years. Mary Owstwick otherwise Ellard, entered upon the premises in question on the devisor's death, and suffered a recovery, and levied a fine thereof, and conveyed the same to the defendant in fee; M. Owstwick afterwards died without ever having had any issue; after whose death, and before the day of the demise in the declaration, P. Davy the lessor of the plaintiff, who also never had any issue, entered into the premises in question to avoid the fine.

Bayley for the plaintiff made two questions, 1st, whether Mary Owstwick took an estate tail, or for life; if the latter only, 2ndly, whether the remainder to the lessor of the plaintiff were a contingent remainder, and in that case defeated by the destruction of the particular estate before the contingency happened: and he contended that she took only an estate for life; and that the remainder to the lessor of the plaintiff was vested, and not contingent. First, it must be admitted that, according to the rule in *Shelley's* case,† wherever an estate for life is granted to a person, and in the same instrument the estate is limited to the heirs of the body of such person [or what is the same in a will, to the issue of such person] the devisee takes an estate tail; because such a limitation to the heirs of the body gives them no distinct interest, but merely extends the estate before given to the ancestor. But it must be taken with this qualification, that where the limitation to the issue points out a different channel of succession or descent than what would take place by the rules of the common law, then the word "issue" must be taken as a word of purchase, and not as a word of limitation; and consequently the first taker would only take an estate for life, and not an estate of inheritance. In *Doe* d. *Long* v. *Laming*‡ the devise, which was of gavelkind lands, was "to A. Cornish and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint tenants;" and there Lord MANSFIELD observed § that the gavelkind descent being broken by giving the estate to females *as well as males, and as tenants in common, the heirs of [*32] A. C.'s body could not take otherwise than as purchasers; for it would be a void devise if those words were construed to be words of limitation. So here the limitation to the issue equally breaks the course of descent; for the issue of M. O. as such would not take as tenants in common. *Wilson* v. *Vansittart*,‖ *Doe* v. *Lyde*,¶ and *Goodwright* v. *Dunham*,†† are to the same effect; though indeed in the last of these, words of limitation were superadded after the devise to the children. The only case which may be

† 1 Co. 93.
‡ 2 Burr. 1100.
§ Ib. 1110.
‖ Ambl. 562.
¶ 1 T. R. 593.
†† Dougl. 264.

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cited on the other side is *Doe* v. *Applin*,† where the devise was to "A. for life, and after his decease to and amongst his issue, and in default of issue, then over;" in which case A. was held to take an estate tail. But in that case there were no cross remainders expressed, and none could be implied: and the Court laid great stress on that circumstance; because for want of them there was no way of effectuating the general intent of the devisor, but by rejecting the words "and amongst," and giving A. an estate-tail. But here is enough in this case from whence to raise cross remainders, for which, as the Court have determined in a late case,‡ no particular form of words is necessary; for the devise over to Peter Davy is not to take effect unless all the issue of M. O. die without issue; the whole of the estate being intended to go over together. [Lord KENYON said he need not argue that point any farther, as he agreed that cross remainders might be raised in this case.] He next argued that the word issue must either mean children, when it is a word of purchase, or heirs of the body, when it is a word of limitation. Now here the intent appears to use the word issue as children in the devise to the issue of M. O.: 1st, because he considers that the issue of M. O. might all die and yet leave issue; and therefore he could not have intended to have included all those descendants in the devise to the issue of M. O. 2ndly, it is also clear that such was the intent from the power of leasing which is given for twenty-one years of some part of the estate, which power as applied to tenants in tail would have been nugatory; and therefore it can only be intended that M. O. was to take an estate for life. Secondly, Whether the limitation to the lessor of the plaintiff be a vested or contingent remainder depends on *two points: 1st, Whether the limitation to the issue of M. O. would have given them an estate in fee; or, if not, 2ndly, Whether the lessor of the plaintiff would have been entitled to take in case M. O. had had issue, and that issue had survived twenty-one. 1st. If issue mean children in this case, as has been before contended, then the devise would be no more than to M. O. and her children: but a devise to children, without more, or a devise to issue, without more, would only give an estate for life to the

[*33]

† 2 R. R. 337. ‡ *Vide Doe* v. *Wainewright*, 2 R. R. 634.

persons meant by that designation, *Taylor* v. *Sayer*,* *Cook* v. *Cook*;† so a devise to children only; *Wylde's* case;‡ so a devise to all and every the daughters; *Hay* v. *The Earl of Coventry*.§ If then these words would only convey an estate for life to the children of M. O., it remains to see, 2ndly, Whether there be anything else in the will from whence the Court can raise a fair presumption that the intent of the testator was to give the children a fee, and that without giving them such an estate they cannot effectuate the general intent of the will. Now there is only one circumstance from which such a presumption can be raised, and that is, that the limitation to the lessor of the plaintiff, in case M. O. should have issue, depended on the event of that issue's dying under twenty-one. But there is no case where a remainder over is limited after a dying under twenty-one, in which those words have been held to raise a presumption, that it was the intent of the devisor to give a fee. But even if that might furnish such a presumption of intent, it is rebutted by the other event, on which the remainder over is limited, namely, the dying without issue. Making a devise over upon the event of not leaving lawful issue of the body would give an estate tail instead of a fee. The very circumstance therefore of giving the estate over is strong to shew that the testator did not mean to give a fee to the children of M. O. In *Soulle* v. *Gerrard*,‖ the word "or" being construed "and" brings the case in terms within the present; and there the words, "if he die within age or without issue," were held to pass an estate tail only and not the fee. This was recognized by Lord HOLT in *Helliard* v. *Jennings*,¶ and by Lord HARDWICKE in *Brownsword* v. *Edwards*.** If then the issue, if any, would only have taken an estate tail, the remainder to the lessor was a vested remainder at the time of the fine levied.

Shepherd, contrà, was stopped by the Court. [34]

LORD KENYON, Ch. J.:

Though this case has been ably and fully argued on the part

* Cro. Eliz. 743.
† 2 Vern. 545.
‡ 6 Co. 16, b.
§ 3 T. R. 83, and *Denn* dem. *Briddon* v. *Page*, M. 24 Geo. III. there cited.
‖ Cro. Eliz. 525, and Moor, 422.
¶ 1 Ld. Raym. 506.
** 2 Ves. 248.

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of the plaintiff, the whole depends on the last point made. I agree that the limitation to M. Owstwick was for life only, and that the limitation to her children was to them as purchasers; and it certainly is sufficient to carry to them some quantity of estate. If the plaintiff's counsel had succeeded in proving that there was nothing to be collected from the will to shew that the children were only to take for life, then according to the case of *Roe* v. *Grew*, in Wilson,* the Court would have endeavoured to convert the estate to M. Owstwick into an estate-tail, in order to effectuate the intention of the devisor. It has been argued that the words in the will are only sufficient to give an estate-tail to her children: but I think there is enough in the will to carry a fee to them. There are the prefatory words "all his freehold and leasehold estates," which will carry the fee, if it appear to have been the intention of the devisor that they should have that effect; the word "estates" also will *ex vi termini* carry a fee. In order to discover the devisor's intention, consider what was his situation when he made his will; he had a niece, who would probably become the mother of children, and he gave an estate for life to that niece, and then an estate to the children which that niece might have: if the will had stopped there, the children would have taken a fee: but the devisor then gave the estate over, "but in default of such issue, or if they should all die under the age of twenty-one and without leaving issue, &c." There is no doubt indeed but that a word of conjunction in a will has been construed in the disjunctive, and *vice versâ* a disjunctive word construed in the conjunctive, where it has been necessary to give effect to the devisor's intention: but unless there be something in the will from which it is to be collected that the devisor did not use such words in the grammatical sense, the grammatical construction must prevail. In the present case the word used is a conjunctive word, "and;" now, by construing that word "in its proper sense" we shall give effect to his intention. The devisor seems to have reasoned thus: "if the children of my niece live to attain the age of twenty-one, when they will be qualified to dispose of this property prudently, I give it to them in fee; if they happen to die under twenty-one, and without

* 2 Wils. 322.

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leaving issue, then I will consider to whom I can best dispose of the estate, and in such an event, I will give *it to my collateral relations." That brings the present case within that of *Loddington* v. *Kime*,† which is the leading case upon this subject, and converts all the subsequent limitations into contingent remainders. Those depended on the particular estate given to the niece; and she having destroyed this particular estate before they could take effect, they consequently fell to the ground. Perhaps the devisor was not aware that the niece could destroy the estate given to her children; but the plaintiff's argument goes to admit that she had that power; and it is a necessary consequence of our putting such a construction on the will as will best effectuate the intention of the devisor. In determining the present case I proceed on the words of the will, giving legal effect to every word contained in it; and they all lead to this conclusion, that this was a contingency with a double aspect; if M. Owstwick had any children, the estate was limited to them in fee; if she had no children, or if she had any, and they died under twenty-one and without issue, then it was to go to the lessor of the plaintiff. But all these rested in contingency; and the particular estate of freehold, by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it.

Postea to the defendant.

DICKSON AND OTHERS, ASSIGNEES OF SMITH AND KERR, BANKRUPTS, *v.* EVANS.

(6 T. R. 57—60.)

1794
Nov. 15.
[57]

To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes, issued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unless he shews further that such notes came to his hands before the bankruptcy.‡

THIS was an action upon a promissory note of the defendant's payable to the bankrupt. The defendant gave notice of set off,

† Salk. 224.

‡ See *Ex parte Theys, Re Milan Tramways Co.* (1884) 25 Ch. D. 587, 594; 53 L. J. Ch. 1008; *Ex parte Reid, Re Gillespie* (1885) 14 Q. B. D. 963, 965; 54 L. J. Q. B. 342.—R. C.

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that the bankrupt before and at the time of his bankruptcy was indebted to him to a greater amount upon certain cash notes issued by the bankrupt before his bankruptcy, payable to bearer.

At the trial before Rooke, J. at Monmouth, the defendant produced such notes as were mentioned in his set off, dated prior to the bankruptcy, but did not prove when they came into his hands; on which ground it was contended on behalf of the plaintiffs that the set off was not established, it being incumbent on the defendant to shew that his set off existed at the time of the bankruptcy, for that no debt accruing to him subsequently would avail. But Mr. Justice ROOKE, being of opinion that the bearer of such notes was not called upon to prove when he took them, that *primâ facie* they must be taken to be fairly obtained, and must have reference to the time of the date, which was before the bankruptcy, and that if they had got to the hands of the defendant subsequent to the bankruptcy, the *onus probandi* lay on the assignees, nonsuited the plaintiffs. A motion for a new trial was made in Easter Term last, which came on to be argued in Trinity Term following: but it stood over for further consideration, it being understood that there was a similar case depending in the Court of Exchequer. At the conclusion of the argument in Trinity Term last, LAWRENCE, J. observed, that if the notes had been made payable to the defendant himself, he should have thought it reasonable evidence of their having come to his hands at the time they bore date. And now the case was spoken to again by

Erskine and *Lewis*, who shewed cause against the rule:

Primâ facie such notes must be taken to be evidence of a debt due from the bankrupt to the person who may be the holder of [*58] them at the time when they bear date, especially in *the case of notes issued by bankers, as in the present case, which are always considered as cash. And though this may be rebutted by evidence, shewing that they had been fraudulently brought up after the bankruptcy in order to be set off against prior debts due to the bankrupt's estate, yet no such evidence being offered the presumption is in favour of the holder. The principal case which will be relied on by the other side is *March* v.

Chambers,† where it was held that a note drawn by a bankrupt, and endorsed to a debtor of his after the bankruptcy, could not be set off against a claim by the assignees. But there it expressly appeared that the note was indorsed after the bankruptcy; and the Court avoided giving any opinion how the case would be if the nature of the transaction at the time of the actual indorsement did not appear. In *Hankey* and others assignees of *Vaughan* v. *Smith*,‡ it was held, that in order to constitute mutual credit, within the 5 Geo. II. c. 30, it was not necessary that the parties meant particularly to trust each other. Now here the date of the notes is *primâ facie* evidence that they came into the defendant's hands before the bankruptcy; the date being in 1792, and the bankruptcy in the following year; and it was sufficient at least to call upon the assignees to prove the contrary. Besides, the stat. 5 Geo. II. c. 30, does not apply to this case, this being an action in a Court of law.

Bower and *Russell* for the plaintiffs were now stopped by the Court.

LORD KENYON, Ch. J.:

I am of opinion on the words of the Act of Parliament, on the reason of the thing, and on the authority of decided cases, that the rule should be made absolute for setting aside the nonsuit. The words of the stat. 5 Geo. II. c. 30, s. 28, are express, that if it shall appear to the commissioners that there has been mutual credit given by the bankrupt, or mutual debts between the bankrupt and any other person at any time before the bankruptcy, the commissioners shall state the account, &c. and what shall appear to be due, &c. shall be claimed or paid. That Act was founded on good sense; and it provides that the assignees shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. That is the justice of the case. But it would be most unjust indeed if one person, who *happens to be [*59] indebted to another at the time of the bankruptcy of the latter,

† 2 Stra. 1234. ‡ 3 T. R. 507.

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were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties. It is said however that the rule by which we are to proceed in a Court of law under the statutes of set off is a different rule from that by which the commissioners proceed under the statute 5 Geo. II. c. 30: but it must be remembered that that Act proceeded on the law of the case, and applied the same rule to the commissioners of bankrupt. The cases, which have been decided on the statutes of set off, are uniform. In addition to the cases cited there is that of *Lucas* v. *Marsh*,* in which it has been held that when an indorsed note is set off by the defendant, it must be proved that it was indorsed before the plea was pleaded. The whole of the present case is resolvable into this question, on whom did the *onus probandi* lie? That being settled, every thing else follows of course. Now the cases of set off are understood to be in the nature of cross actions; and if the defendant, instead of setting off these notes, had brought his cross action against the assignees, he must have proved every thing necessary to constitute his demand; and the time when the notes were indorsed would be one material ingredient in that case; then, under this set off he must prove the same things. If the commissioners had refused to allow this set off, and the defendant had applied to the Lord Chancellor by petition, he must have set forth in that petition that the notes were indorsed to him prior to the bankruptcy, and he must also have proved it. Therefore the words of the statute of bankrupts, the statutes of set off, the decisions on the different statutes, and the forms of proceeding, all lead to this conclusion that the *onus probandi* lay on the defendant, who wished to avail himself of the debt arising from the possession of the notes, and consequently that the nonsuit must be set aside.

ASHHURST, J:

Much fraud and great injustice would be introduced if any

* Barnes, 453, 4to edit.

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[*60]

other rule than that laid down by Lord KENYON were to prevail. It is a general rule of evidence that *in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant: but it is said in this case that it was incumbent on the assignees to prove the time when the defendant received these notes. But the assignees could have no means of knowing that fact, whereas it must have been known to the defendant; and as the latter relied upon it as the ground of his set off, and did not prove it, the assignees were entitled to recover.

GROSE, J.:

I am clearly of the same opinion, though I entertained some doubts upon the subject at first. The stat. 5 Geo. II. c. 30, seems peculiarly adapted to this case; one object of the Act was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending that he was a creditor at the time of the bankruptcy.

Per CURIAM: *Rule absolute.*

MANN AND OTHERS, ASSIGNEES OF STEVENS, *v.* SHEPHERD.

(6 T. R. 79—80.)

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A creditor of a bankrupt, who, after notice of an act of bankruptcy, has received a payment reducing his debt below the requisite amount, is not thereby precluded from suing out a commission of bankrupt, for the payment being invalid the original debt remains in force.

IN trover, the only question was, whether the petitioning creditors' debt were sufficient to support the commission of bankrupt, under which the plaintiffs claimed. At the trial before Lawrence, J. at York the facts appeared to be these:

The bankrupt previous to his bankruptcy was indebted to Mann the petitioning creditor in above 100*l.* But after the act of bankruptcy which was known to Mann at the time, and upon which he afterwards took out the commission, he received

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of the bankrupt about 50*l.* which reduced his debt under 100*l.* But being afterwards advised that he could not retain this money, he sued out the commission and proved his original debt, retaining the 50*l.* in his hands, which he carried to the account of the bankrupt's estate. The learned judge was of opinion that the payment made by the bankrupt to Mann, with notice of the act of bankruptcy was void, and that therefore the debt remaining as it was before was sufficient to support the commission; and he directed a verdict to be found for the plaintiffs, with leave to the defendant to move to enter a nonsuit if the Court should be of a different opinion. A motion to that purpose was accordingly made, and a rule *nisi* granted, which

Law and *Wood* were called upon this day to support:

They admitted that the payment to Mann was void as against the general creditors, but contended that he was precluded by his own act from taking out a commission thereon; because as between [*80] him and the bankrupt no debt to the amount of *100*l.* subsisted in conscience from the bankrupt to him, he having received so much in payment as reduced it under that sum: and that if no commission had been sued out, that money could never have been recovered back from him. And they compared this to the case of an act of bankruptcy committed by a fraudulent assignment of all the bankrupt's property; in which case it has been held that the party privy to such assignment is estopped from suing out a commission thereon; and yet the assignment in that case is void as against the general creditors. So here though the fraudulent payment by the bankrupt to Mann was void, yet it shall estop the latter from proceeding as if no such payment had been made; especially since he retained the money in his hands at the time of the commission sued out and afterwards.

LORD KENYON, Ch. J. (stopping *Heywood*, Serjt. who was to have shewn cause against the rule):

It is clear that this payment cannot be retained, and consequently the original debt remains in force. The creditor himself, being aware that the money could not be retained, did

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not consider the payment as valid, for he took out the commission on the ground that his whole demand was unpaid; and he cannot now be permitted to say that the payment was a good one.

Per CURIAM:

Rule discharged.

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(6 T. R. 80—87.)

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Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract and return the goods with the consent of the seller so as to give the seller a preference to his other creditors.

[THIS was an action of trover, brought by the plaintiff as assignee of Lloyd a bankrupt for 60 tons weight of iron; and at the trial admissions of fact were made by the parties, by which it appeared that the bankrupt, finding himself to be insolvent, informed the defendant of the circumstance, and offered to return to the defendant certain iron which the defendant had a short time before sold to the bankrupt and delivered into his warehouse, and also to deliver to him a further parcel of iron, the defendant to be debited with the price of both parcels. This offer was accepted by the defendant, and the iron was accordingly transferred to the defendant by a bill of parcels, and by delivery of the key of the warehouse in which it was deposited. On the facts so admitted (the details of which so far as material will further appear from the judgment) the jury, under the direction of the judge, found a verdict for the plaintiff, but liberty was given to the defendant to have that verdict set aside, and a verdict entered for him, if this Court should be of opinion that under the circumstances of the case the plaintiff was not entitled to recover.]

A rule for that purpose having been obtained on a former day, [83]

Law, was now prepared to shew cause against it; but the counsel on the other side were desired to begin.

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Heywood, Serjt. and *Topping* for the defendant contended that as it was competent to both the contracting parties to rescind the contract before the bankruptcy of the vendee, and as in fact they did rescind it, the property in question was re-vested in the defendant. A trader has a general disposing power over his effects at all times before he becomes a bankrupt, and the exercise of that power is in all cases valid, unless it be considered as fraudulent in the eye of the law. But all payments on the eve of a bankruptcy are not fraudulent; some are protected by the law, 1st, In the common case where money is voluntarily paid in the ordinary course of trade and dealing; 2nd, Where it is recovered by the due diligence of the creditor against the will of the bankrupt; or 3rdly, As in the present case, where a trader, finding himself unable to pay for goods for which he has contracted, rescinds the contract before the goods have been mixed with the general mass of his property, and while there is (what is called in some of the cases) an ear mark upon them, by which they may be distinguished. The Courts have always favoured transactions of this kind, as being founded on common honesty; and it has been thought just that a vendee should be permitted to return that property in specie for which he is unable to pay. And therefore this is not like the case where a bankrupt gives an undue preference to one creditor by paying his whole demand out of the general fund, that ought to be distributed amongst his creditors at large; for this is only returning to the vendor his own property, which is unmixed with, and may be distinguished from, the rest of the vendee's goods. [In *Harman* v. *Fishar*,* Lord MANSFIELD said that "all questions of preference turn upon the action being complete before an act of bankruptcy committed;" and here the iron was re-delivered on the 18th; and the act of bankruptcy was not committed until the 23rd of March. In *Atkin* v. *Barwic* † and *Salte* v. *Field*,‡ the bankrupt, though on the eve of bankruptcy, returned the goods, and the transaction was held good. In *Smith* v. *Field*,§ the principle was admitted, though the vendor in that case did not agree to rescind the contract.]

* Cowp. 123.
† 1 Str. 165.
‡ 2 R. R. 567.
§ 2 R. R. 630.

*LORD KENYON, Ch. J.:

The arguments in cases of this kind are addressed to our compassion; and we are sorry to find that sometimes when an honest tradesman has sold goods to another to a considerable amount, and the latter becomes insolvent, the former is not able either to recover the goods themselves or the full payment for them. But the rules of law are framed with a view to benefit the bankrupt's creditors in general, and not to give a preference to any in particular. It is said however that the vendor may in all cases rescind his contract with the consent of the vendee at any time before the bankruptcy of the latter: but if that were so, all the creditors of a bankrupt, whose goods remained in his hands in specie, might, when they found that he was in insolvent circumstances, go to the bankrupt's property and bring away what each had contributed to the fund, leaving nothing to satisfy the rest of the creditors. The present seems to be an extremely clear case, for it is founded in fraud. The parties themselves endeavoured to give a different complexion to the transaction from that which is the true one, and in order to mislead the creditors of the bankrupt, they made a false entry in the bankrupt's books; where it was stated that the re-delivery of the goods to the defendant was made two days before the time when the transaction really took place; and that fact is of great importance; because that antedate carries the re-delivery back to a time previous to the bankruptcy of Caldwell & Co., on which depended the solvency of the vendee. The goods here were originally sold and delivered to the vendee, and they were locked up in his warehouse: therefore there was a complete transfer of the property from the defendant to the bankrupt at the time; and the question is whether when the latter became insolvent he could re-deliver it back to the defendant in specie. I cannot distinguish the present case from that of *Harman* v. *Fishar* on principle, for this bankrupt knew his insolvent situation at the time when he wished to deliver back the goods in question to the defendant, as well as Fordyce did in that case; there Fordyce finding that he was insolvent was anxious to repay to the defendant some bills which the latter had lent him, and though those bills were as easily distinguishable from

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the rest of his effects as the iron in question was from the rest of this bankrupt's property, the Court there held that it could not be done, because it would prejudice the other creditors of the bankrupt. Three cases however have been cited, and pressed upon us, as deciding the present: but I think they are to be distinguished from this. In *Atkin* v. *Barwic*, the vendees finding [*86] that their affairs were in a declining condition before the *goods arrived at their house in Cornwall refused to accept the goods, and thereby refused to become parties to the contract of sale: and though when the goods did arrive by the waggon the vendees could not turn them loose in the street, yet they did what was tantamount to rejecting them, they sent them to a friend of the consignors for their use. In *Salte* v. *Field*,† consider who was the party to the contract; not the clerk of the vendee who lived in London, but Dewhurst who was residing in New York; and he knowing his insolvent situation, sent orders a month before the transaction in dispute took place to his clerk here not to purchase any more goods for him; the clerk immediately on receipt of this order applied to the vendors to take the goods back again, who agreed to rescind the contract. In giving my opinion on that case, I said that "the property in the goods was apparently devested out of the plaintiffs at the time of the sale, according to the opinion which the parties then had of the transaction:" but though the property was then apparently devested out of the vendors, it was not so in reality, because the delivery to the agent of the vendee was controlled by the prior orders of the bankrupt his principal. But in this case the goods were delivered to and accepted by the vendee, and the property remained in him until he became insolvent. What was laid down by Lord HARDWICKE in the case alluded to does not apply to such a case as the present: he only said that before the contract was complete, and while the goods were *in transitu*, the owner might by any means, without committing a felony, regain the possession of his goods for which he had not been paid. That, though said in a court of equity, is now become a general and a good rule of law: but it must be confined to those cases where the goods are *in transitu*. Our decision therefore against

† 2 R. R. 567.

the defendant in this case will be conformable to every decided case, and to the reason of the thing.

ASHHURST, J.:

It was admitted in the argument, that if the contract of sale were not rescinded at the time of the bankruptcy of the vendee, it could not be rescinded afterwards by any act of the contracting parties; now I think that the contract here was not rescinded before the insolvency of the vendee. After the contract for the sale of the iron, it was actually delivered to the vendee, and put into his cellar, and he gave a bill of exchange for the payment of it: then the contract was complete, and could not be rescinded by *any subsequent act of the parties so as to affect the interests [*87] of third persons. But it has been said that this iron was not mixed with the rest of the bankrupt's stock: it is not necessary that it should be mixed; but if it were, this iron was, to a certain degree, mixed with the rest of the stock, for there was some other iron in the same cellar. I do not rely however on that circumstance, because I think it immaterial; for if once the goods be fairly and completely delivered, whether they be or be not mixed with the rest of the vendee's stock, the bankrupt and the vendor cannot rescind the contract if the rights of other persons intervene, with a view of giving a preference to the vendor.

GROSE, J.:

In cases of this sort it frequently happens that the situation of the particular creditor is a very hard one; and the Courts are glad that they can attain the justice of the case by deciding that the contract was not completed: but when once the contract is complete, however hard it may be on either party, it is binding on both. In determining the cases of *Atkin* v. *Barwic*, and *Salte* v. *Field*, the Court proceeded on this ground, that the contract was not perfected, and therefore they said that the vendors were entitled to have their goods again. But that is not the present case, for the contract was perfected by the delivery and acceptance of the goods; it is true they were not paid for, but they were sold for a sum payable at a future day, and the property was vested in the purchaser when they were delivered to him.

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LAWRENCE, J.:

The facts of the case are not exactly as the defendant's counsel have stated and reasoned upon them. For it appears by the admissions of the parties that the bankrupt was indebted to the defendant on another account; and in order to satisfy this as well as the other debt, he gave him not only the iron in question, but also all his stock in trade. Now that was fraudulent as far as it respected the rest of the creditors.

Rule discharged.

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NOWLAN, A BANKRUPT, EX PARTE.

(6 T. R. 118—122.)

If upon the examination of a bankrupt touching the disposition of his property, he swear to an account of the same, which appears to be incredible, the commissioners may commit him to prison.*

THIS party, who was established in trade in London, in April, 1793, went over to Ireland; and a commission of bankrupt issued against him on the 23th of the same month, on which he was declared a bankrupt: and notice was issued for him to surrender and make a discovery of his effects, with which he did not comply for some time. But on the 27th July following he attended and was examined, when the following questions were put to him, and he gave the following answers. "Q. As you admit to have received 3,505*l.* within a week before you left London, did you receive any further sum within that time? A. I believe I did. Q. To what amount? A. I cannot precisely say. Q. Will you swear you did not receive 2,000*l.* more? A. I cannot; (but he added afterwards) I wish to correct that answer because I recollect I did receive about 1,000*l.* above the 3,505*l.* within the last week. Q. As you say you were overturned in the mail coach in April, 1793, and that you then lost your pocket-book, how much had you in your pocket-book at the time the coach was overturned? A. 3,500*l.* or 3,600*l.* in bank notes. Q. As you say that you had not more notes in your pocket-book than 3,600*l.*, and having received 1,000*l.* over and above the 3,505*l.* within a week before you left town, how do you account

* See now Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 11.—R. C.

for the difference, which is about 900*l.*? A. I cannot give any account; (but he added afterwards) I correct this, by not admitting to have received 1,000*l.*; it might be from 400*l.* to 600*l.* more than 3,500*l.* Q. How do you account for the 400*l.* or 600*l.*? A. I cannot at present." These answers not being satisfactory to the commissioners, they committed him to Newgate, till he should answer to their satisfaction. Being again brought up before them, and being asked what he had done with two sums of 373*l.* 4*s.* 3*d.* and 222*l.* 6*s.*, which it appeared he had received, he answered he had received the money, but he could not then disclose what he had done with it; on which he was again committed to custody for not answering satisfactorily. On a subsequent examination he gave some further answer as to these sums;† and he was then again questioned whether he had received any sum within a week before he left London over and above the 3,505*l.*? "A. I received to the amount of about 1,000*l.* or thereabouts. *Q. What did you do with this 1,000*l.*? [*119] A. I lost it with my pocket-book with the 3,505*l.* as mentioned in my former examination, except about three 20*l.* notes." These answers not being deemed satisfactory to the commissioners, he was remanded to his former custody.

The bankrupt was now brought up into this Court by *habeas corpus*, and a motion made to discharge him out of custody upon the ground of the sufficiency of his answers.

Garrow and *Lambe* in support of the motion for his discharge:

Admitting the bankrupt's answer to be true, which he has sworn at the peril of being indicted for perjury if false, and which cannot be disputed in this stage of the proceeding, it was the only answer which in the nature of the thing he was capable of giving. For the substance of the examination by the commissioners was to inform them how the bankrupt had disposed of a certain sum of money acknowledged to have been received by him a short time previous to his bankruptcy; now if it were really true that he lost bank notes to that amount out of his pocket-book upon the occasion of his being overturned in the mail coach in his way from London to Dublin, it was impossible

† And the sufficiency of that answer was not now called in question.

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for him ever to give any other answer to the question; and the bankrupt must suffer imprisonment all his life, notwithstanding he has disclosed all he knows, if the Court do not relieve him. The question in these cases is not, whether the money has been disposed of to the satisfaction of the creditors; but whether the bankrupt has given direct and explicit answers to the interrogatories put to him, concerning the manner in which he has disposed of it; such answers whereon an assignment of perjury may be made if not true. If a bankrupt in answer to a question how he disposed of a certain 100*l.* declare that he lost it by gaming at such a time and place and to such and such persons; this, though not satisfactory in one sense of the word, yet being direct and explicit, and capable of being contradicted if not true, would not warrant a commitment on that ground. In *Perrot's* case † the only account he could give at first of about 10,000*l.* of his property unaccounted for was "that for 9 or 10 years he had been extremely extravagant and had spent large sums of money;" that was of course deemed unsatisfactory, and he was remanded. Upon being brought up again, it appeared that one of the items of his account to which he had answered was "expenses attending the connections I had with the fair sex 5,500*l.*". *This was also held incomplete and unsatisfactory. But the very ground of objection in that case was the generality of the answers, upon which it was impossible to found an indictment for perjury; because no specific fact was sworn to. But in *Miller's* case,‡ he having sworn "that he could not positively recollect whether he had bought two certain bales of China silk of the value of 270*l.* by a broker, or not, but should rather believe he had bought the same by a broker," it was held sufficient, though he refused to swear positively to his belief one way or the other; because (as was said by Lord Ch. J. DE GREY) a man may really have lost a particular recollection of an event, so that it becomes impossible for him honestly to give any other answer. Now this case is stronger; for here the bankrupt swears positively to the fact of the loss, and mentions the particular time and circumstances attending it. And the only doubt, which can arise in the case, is whether the fact sworn to

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† 2 Burr. 1122 and 1215. ‡ 3 Wils. 420, and 2 Bl. Rep. 881.

by him be true or false; but that question if disputed by the creditors ought to be tried in some other way, and not to be decided without any trial at all by confining the bankrupt in prison for life; it being sufficient in this stage of the business for the bankrupt to swear positively to the fact.†

LORD KENYON, Ch. J.:

There are no technical rules, by which cases of this kind are determined, but the question in each particular case is whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person. And I confess that I should not have thought that the answers given in *Miller's* case, as it has been now stated, were satisfactory to my mind. It has been contended on behalf of this person that the answers he gave must now be taken to be satisfactory, because if they be not true he may be indicted for perjury; but how can an indictment for perjury against him be supported when the secret remains locked up within his own breast; the creditors are not at present furnished with any materials to support such an indictment. But it is impossible for any reasonable mind to be satisfied with the answers the bankrupt has given, if all the examinations be considered together. Let us see what was his situation. In April, 1793, he set out on a journey to Dublin, and soon afterwards a commission of bankrupt was issued against him; in the July following his first examination was taken; and here it must *not be forgotten that this was the [*121] examination of a man who had been in trade, whose accounts ought to have been accurate, and who ought to have remembered what property he took with him, considering, (according to his own admission) that it amounted to a very large sum. At first he swore that he took the sum of 3,505*l.* with him, which he lost together with a pocket-book by the accident of the mail coach being overturned. The commissioners, having reason to suspect the truth of this account, and that the bankrupt had received a larger sum just before he left London, then asked him what further sums he had received within a week before he set out for

† The 5 Geo. II. c. 30, s. 16, enables the commissioners to commit the bankrupt if "he do not fully answer to their satisfaction."

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NOWLAN, Ex parte.

Ireland; at first he said that he did not recollect, and soon afterwards admitted that he had received 1,000*l.* Being interrogated what became of this last sum, he then retracted what he before said, and added, that instead of 1,000*l.* he had only received from 400*l.* to 600*l.*; and to the question, how he had disposed of the 400*l.* or 600*l.* he gave no answer whatever, on which he was committed, and very properly so, to prison. Then it appears that he was brought before the commissioners at different times, and on one of those examinations being again asked what sum he had received besides the 3,505*l.* within a week before he left London, he again admitted that he had received about 1,000*l.*, which (except three 20*l.* notes) he then for the first time swore he had also lost with his pocket-book with the 3,505*l.* Now can any person say that this was a satisfactory answer? It seems to me that this bears a strong resemblance to *Perrot's* case, and that the answers given in this case were as satisfactory as the answer in that case, but that was canvassed in different Courts in Westminster Hall, in all of which the answer was deemed insufficient. It was to be hoped that the sequel of that cause would have been a striking example to all future bankrupts; a large sum, of which Perrot had given so unsatisfactory an account was afterwards discovered in the bottom of a chair, and he was executed for concealing his effects. In this case I do not take any one answer by itself: but combining all the examinations together, I think they are not sufficient to satisfy an honest mind, and therefore this person must be remanded.

ASHHURST, J.:

It would be a ridiculous ceremony for the commissioners to go through in examining a bankrupt, if they were bound to give credit to his account, however improbable or absurd it might be, merely because he has the *effrontery to swear to it. In these cases they are to exercise their judgment upon the whole. And independently of the contradictory answers that this man gave on his different examinations relative to the same sums, his conduct at the time of the supposed loss is highly suspicious. When he arrived at Chester and missed his pocket-book containing so large a sum according to his account, it was natural

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to suppose that he would have made some inquiries: but he neither advertised his loss, or took any one step in order to recover what he says he lost; and now he refers the loss of every thing, of which he does not give any other account, to the same accident in the mail coach. This appears to be merely an after-thought, and I am of opinion that his answers were unsatisfactory.

GROSE, J.:

It is impossible for any person to believe the story the bankrupt has told. First he pretended that he could not recollect what sum he had received the week before he left London, then he said it was 1,000*l.*, then he retracted and said it was 400*l.* or 600*l.* and afterwards he recurred to his second account, saying it was 1,000*l.*; and as to the disposal of it, at last he swore it was lost by the same accident in the coach, which he had not mentioned in his first account of the money lost. These are such answers as no man of common sense can consider as satisfactory.

LAWRENCE, J.:

The account given by this bankrupt is perfectly incredible; and if so, the commissioners did right in deeming the answers to be unsatisfactory.

The bankrupt was remanded to prison.

Erskine and *Giles* were to have opposed the motion.*

HOUSIN *v.* BARROW.

(6 T. R. 122—123.)

1794. *Nov.* 27.

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The sheriff having signed and sealed a warrant to A. and all his other officers to arrest B., C.'s name was afterwards inserted instead of that of A.; held that the warrant was illegal, and the arrest by C. consequently void.

SHEPHERD obtained a rule on a former day calling on the plaintiff to shew cause why the defendant, who had been arrested

* Some years afterwards an application was made to the Lord Chancellor to discharge the bankrupt; and Lord Eldon, on full consideration, refused the application. The arguments and judgment on that occasion are reported in 11 Ves. jun. 511.—R. C.

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at the suit of the plaintiff by one Cook, should not be discharged out of the custody of the sheriff of Nottingham, and why the plaintiff should not pay the costs of this application, on an affidavit stating that Cook's name was not originally in the warrant, for that it was directed to Moore *and all the others of the sheriff's officers for the county of Nottingham, and that Cook's name was inserted after it was signed and sealed by the sheriff.

Clarke, in shewing cause, now observed that the warrant was directed to all the officers of the sheriff of Nottingham (of whom Cook was one) as well as to Moore; and that even if it were irregular, there was no pretence to call on the plaintiff, who was not charged with being privy to the alteration of the warrant, to pay the costs, but that the sheriff alone was answerable for it.

LORD KENYON, Ch. J.:

This was clearly an illegal arrest: and it is proper that it should be made known in the most solemn manner. I remember a case of a very serious nature happening some years ago from the circumstance of altering a warrant: a gentleman, who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead; and he was shot by the defendant in arresting him; the defendant was tried for the murder, and on the trial a special verdict was found; but it was held not to be murder, because the arrest was illegal, and that at the most it was only manslaughter. In such cases the law does not throw any protection round the person, who attempts to arrest by an illegal warrant. But with regard to the costs; as no blame is imputable to the plaintiff; he ought not to pay the costs, and thus suffer for the misconduct of the sheriff's officer.

Rule absolute without costs.

K. B. HILARY TERM.

STOREY *v.* ROBINSON AND OTHERS.

(6 T. R. 138—139.)

1795. *Jan.* 27.

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A horse cannot be distrained damage feasant if there be a rider upon him.

THIS was an action of trespass for an assault and false imprisonment, and for seizing and leading away the defendant's horse upon which he was riding.

The pleadings in this case were long; but the questions in all of them were resolved into the point insisted upon by the defendants on the second plea, namely, that as to the seizing and taking of the horse, they distrained him damage feasant in the defendant Robinson's ground, and impounded him; to which plea there was a demurrer.

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Holroyd, for the demurrer, contended that a horse, on which the owner was riding, could not be distrained, Co. Lit. 47, *a*; and the cases there mentioned in n. 13. In *Simpson* v. *Hartopp* * Lord Ch. J. WILLES in giving the judgment of the Common Pleas, mentioned the case of *Webb* v. *Bell*, in 1 Sid. 440, as the only case in which it is said that a horse may be distrained with his rider on him, damage feasant; and added, "I am far from thinking that case to be law." It is to be observed too that that was only a dictum of Ch. J. KELYNG, in Sid. and not necessary to the decision of the case.

T. Walton, contrà, relied on the dictum of Lord Ch. J. KELYNG in Siderfin, it never having been expressly over-ruled; observing that the opinion of Lord Ch. B. GILBERT † coincided with it. And he added that the passage cited from Co. Lit. 47, *a*, was applicable only to a distress for rent, between which and a distress damage feasant a difference is taken in the same page, many things being privileged from distress in the former case, that are not in the latter.

* Cited in *Gorton* v. *Falkner*, 4 T. R. 569, 2 R. R. 466.

† Gilb. Law of Distress, 45.

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LORD KENYON, Ch. J.:

This distress cannot be supported. All the authorities upon this point are collected altogether in the note in Hargr. Co. Lit. 47, and the clear result of them is that such a distress is illegal. If it were permitted to a party to distrain a horse, while any person is riding him, it would perpetually lead to a breach of the peace.

Per CURIAM:

Judgment for the plaintiff.

1795. *Jan.* 28.

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THE KING *v.* D. JACKSON.

(6 T. R. 145.)

If a defendant, who had been convicted of an indictment in an inferior jurisdiction, remove the record here by *certiorari* between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, this Court will send the record back by *procedendo*, without going into the objections to the indictment. If the defendant wish to take the opinion of this Court on the sufficiency of such an indictment, he must move the record here by writ of error after judgment below.

THE defendant, having been convicted at the Sessions for the North Riding of the County of York on an indictment for extortion, removed the record here by *certiorari* between the verdict and the judgment, and then obtained a rule calling on the prosecutor to shew cause why the judgment should not be arrested for some objections to the indictment. The case stood in the paper for argument to-day: but when it was called on,

Lord KENYON, Ch. J. said, that though there were instances in which the proceedings had been removed from inferior jurisdictions in this stage, it was a practice that ought to be discouraged, because it was attended with great expense and many inconveniences. That in cases where the punishment is discretionary, and this Court should be of opinion after hearing the case argued that the judgment ought not to be arrested, (and such an opinion could not be revised on a writ of error), a *procedendo* must be awarded, and the party sent back again to the inferior jurisdiction to receive judgment. That in *R.* v. *Potter*,*

* 2 Ld. Raym. 938.

this Court in a similar case refused to go into the objections made in arrest of judgment, and awarded a *procedendo*. And his lordship added that he thought the Court should adopt the same mode in this instance; observing that the defendant might bring a writ of error after judgment, if he were advised that the record was erroneous.

The COURT accordingly ordered a *procedendo*.

THE KING *v.* JAMES GOODCHEAP.

1795. *Feb.* 4.

(6 T. R. 159—161.)

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The accounts of an overseer of the poor should be settled at the end of the year; and if a person be appointed an overseer for four successive years, and do not make any rate in the three first to reimburse himself what he expends in those years, he cannot in the fourth year make a rate for that purpose.*

T. WITHNALL appealed to the Cambridgeshire Sessions against the defendant's accounts as overseer of the poor of the parish of St. Michael in Longstanton; the Sessions amended the account; and stated the following case for the opinion of this Court.

At Easter, 1788, James Goodcheap was duly appointed an overseer of the parish of St. Michael at Longstanton: at Easter, in the several years 1789, 1790, and 1791, he was again appointed one of the overseers of the parish, and continued in the office those four successive years. At Easter, 1792, W. Elwood and W. Stanley were appointed overseers; and Stanley becoming insolvent about three weeks after his appointment, Goodcheap was again appointed in his room for the remainder of the year ending at Easter, 1793. Stanley, while he was overseer, neither paid any money for the use of the poor nor made any rate. During the four first years, beginning at Easter, 1788, and ending at Easter, 1792, Goodcheap did not make out any account as overseer, nor at any time after the expiration of any of those years, pursuant to the statute. At the expiration of the last year, ending at Easter, 1793, he made out one general

* Followed in *Brazier* v. *Bryant*, 3 Bing. 167.

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account, as overseer for the four successive years, ending at Easter, 1792, and for that part of the year in which he served the office ending at Easter, 1793: which account was allowed by two justices, and upon that allowance a balance of 9*l.* 1*s.* 0*d.* appeared to be due to the defendant. An appeal was lodged at the Midsummer Sessions, 1793, being the next Sessions after the allowance of that account, and was adjourned to Michaelmas Sessions following. During the four years ending at Easter, 1792, Goodcheap expended the sum of 232*l.* and 9½*d.* for the use of the poor, namely, for the year commencing at Easter, 1788, [*160] 84*l.* 18*s.* 11½*d.*; for the year commencing at Easter, *1789, 48*l.* 19*s.* 1½*d.*; for the year commencing at Easter, 1790, 64*l.* 13*s.* 4*d.*; for the year commencing at Easter, 1791, 33*l.* 9*s.* 4½*d.*, and was not reimbursed the same or any part thereof. Four rates were made for the relief of the poor previous to Easter, 1792, three of which were quashed upon appeals, and the other was confirmed upon an appeal, but omitted to be collected by Goodcheap on account of the rate being informal. After the defendant was appointed an overseer for the part of the year ending at Easter, 1793, two rates for the relief of the poor were made and collected by him, namely, one at eight shillings in the pound, and the other at five shillings in the pound, out of which he reimbursed himself the money he expended for the four successive years ending at Easter, 1792, and the remainder of the year ending at Easter, 1793, by charging the same in the account appealed to. The appellant only became an occupier in the parish of St. Michael in Longstanton in June, 1792, and paid the rate of five shillings in the pound, and was not assessed to the rate of eight shillings. If the defendant is entitled to reimburse himself the sums expended in the four successive years ending at Easter, 1792, there is due to him the sum of 5*l.* 2*s.* 11½*d.* If on the contrary he is not entitled to reimburse himself such sums, there will be a balance due from him, after allowing him the expenses of the year ending at Easter, 1792, of 219*l.* 0*s.* 4*d.* The Court of Quarter Sessions determined that the defendant could not legally insert in his account the expenses of the four successive years ending at Easter, 1792, but only the expenses of the time when he was in office in the year ending at

Easter, 1793, and they ordered the account to be amended accordingly.

This case was brought up in Easter Term last, when the Court recommended it to the parish to settle the accounts by an agreement with all the parties concerned, intimating a very strong opinion that in point of law the defendant's accounts could not be supported. The case accordingly stood over till now: but some of the parishioners still persisting in their determination to take the opinion of the Court upon the case as stated, it was again set down in the paper for this day.

Chambre and *Raymond*, without attempting to support the rates, observed that as it appeared on the case that the appellant was not assessed on the first rate, he ought not to be permitted to object to the legality of it, whatever objections he might make to the second rate of five shillings in the pound.

LORD KENYON, Ch. J.: [161]

When the case was first brought before the Court, we thought it too clear for discussion, and wished that the parish would agree to settle the account, as it would otherwise bear hard upon the defendant. For as to the question of law, it is impossible to raise a doubt about it; the overseers ought not to include in their accounts charges for several years, but all the items of the accounts should be confined to that year when the accounts are directed by the Act to be passed; otherwise, as the inhabitants of a parish are a fluctuating body, the present inhabitants would be burdened with the expenses of their predecessors. And as to the appellant not being permitted to object to the first rate; the objection is not to the rates, but to the account in which the rates are contained.

Per CURIAM:

Order of Sessions confirmed.

Plumptree was to have argued on the other side.

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HOLLAND *v.* BROOKS.

(6 T. R. 161—162.)

A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it.

PARKE, in shewing cause against a rule for an attachment for not performing an award, resisted the application on several grounds, not appearing on the face of the award, but verified by affidavit; as that the abitrator had not made the award within the time prescribed, and that the plaintiff had since the submission become a married woman.

Parke† in support of the rule, admitted that it was competent to the other party at any period within the time limited to impeach the award for defects appearing on the award itself, but objected to its being impeached in this stage on account of intrinsic matter; observing that the adverse party should have made a specific motion for that purpose, and that if he were now permitted to object to the award for matter not appearing on it, the defendant would be surprised, and could have no previous information of the ground on which the other party intended to impeach it. And

The COURT were of that opinion; saying that a party could not object to an award for any defect not apparent on the award
[*162] itself, in shewing cause against a motion for an attachment, *but that he must obtain a rule for that purpose within the time limited by the Act of Parliament.‡

Rule absolute.

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Feb. 5.
[162]

ZENOBIO *v.* AXTELL.

(6 T. R. 162—163.)

In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original: and if he only set out a translation of it, the Court will arrest the judgment.§

THIS was an action for a libel. The declaration contained three counts; the defendant suffered judgment to go by default;

† *Sic* in original report.

‡ As to the time limited, see now R. S. C. Ord. 64, R. 14.

§ See *Bradlaugh* v. *Reg.* (1878) 3 Q. B. D. 606, 631.—R. C.

and after the plaintiff had instituted a writ of inquiry, upon which the jury gave 100*l.* damages generally, the defendant moved in arrest of judgment, for the insufficiency of the third count, which was as follows; that the defendant, envying the happy state and condition of the plaintiff, and further contriving and maliciously intending wrongfully and unjustly to injure and prejudice the plaintiff in his said good name, fame, credit, and reputation, and to bring him into public scandal, disesteem, and disgrace, on, &c. at, &c. falsely and maliciously, wilfully, wrongfully, and designedly, published and caused to be published a certain other false, scandalous, malicious, defamatory, and opprobrious libel, of and concerning the said plaintiff, in the French language, in a certain newspaper, commonly called and known by the name of *Courier de Londres*, and which said false, scandalous, malicious, defamatory, and opprobrious libel is according to the purport and effect following in the English language; that is to say, "The late famous Bishop of Autun, to the great satisfaction of all honest men, has just received an order to quit England: the same compliment has been paid to an adventurer, a great gambler, who calls himself the Count Zenobio;" by means of the publishing of which said false, &c. the plaintiff is greatly injured, &c.

Wathen moved to arrest the judgment, on account of the insufficiency of the third count, to which he made three objections; 1st, That the original paper, as written in the French language, should have been set out in this count. 2ndly, That *the publication itself was not libellous; and 3rdly, That it was not charged with sufficient certainty to relate to the plaintiff. [*163]

Reader, in answer to the first objection, said that though in cases of this sort the libel was usually set out in the language in which it was written, it was not absolutely necessary, it being sufficient to set forth the translation; and that if it were not properly translated, the defendant might take advantage of it on the trial, since in such a case he could not be said to have written the libel imputed to him.

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ZENOBIO v. AXTELL.

LORD KENYON, Ch. J.:

It is unnecessary to argue the other points, if this objection be fatal; and that this objection must prevail is evident from the uniform current of precedents, in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them, shewing their application to him.

But the COURT gave the plaintiff leave to amend his declaration, on payment of costs.

1795. *Feb.* 5.

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THE KING *v.* W. BRISTOW.

(6 T. R. 168—171.)

The Court will not grant a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; but the proper remedy in case of his refusal to obey such order is by indictment.

A RULE was obtained to shew cause why a mandamus should not issue to the defendant, as treasurer for the public stock of the Eastern part of the county of Kent, commanding him to pay to T. Watson, keeper of the common gaol for the said county, the sum of 25*l.* being part of one quarter's allowance granted to the said keeper by the Court of general Quarter Sessions for the said county. The order of Sessions upon which this application was founded was made at Maidstone on the 29th April last, and is conceived in these terms; that the treasurer of the public stock for the Western part of this county, do forthwith pay to Thomas Watson, keeper of the common gaol of this county, the sum of 50*l.* part of the sum of 75*l.*, for one quarter's allowance granted to him by this Court in lieu of the profits arising from the sale of liquors in the said gaol, taken away pursuant to the directions of an Act of Parliament passed in the 24th Geo. III., whose receipt shall be a discharge to the said treasurer, &c. and that the treasurer of the public stock for the Eastern part of this county do forthwith pay unto the said Thomas Watson, keeper of the common gaol aforesaid, the sum of 25*l.*, the residue of the said sum of 75*l.* in full for the said one quarter's allowance

granted to him by this Court as aforesaid, whose receipt shall be a discharge to the said treasurer of the public stock for the Eastern part of this county; and which he shall be allowed in passing his accounts with this county. There was also an order stated from the justices of the Eastern division at the Quarter Sessions to the defendant, *as their treasurer, not to pay this sum, and that they would indemnify him for his refusal; and he accordingly refused to pay it. It further appeared that the treasurer for the Eastern division is appointed by the justices of that division, to four of whom on his appointment he gives a bond conditioned to apply the public stock in his hands as the Court of Quarter Sessions in the Eastern division shall direct. The county of Kent has been divided immemorially in point of usage into two districts, East and West Kent; but these are not legal divisions, and there is only one commission of the peace for the whole county; though in fact the justices act only in that division wherein they reside. The Quarter Sessions for the Eastern Division are held at Canterbury, those for the Western at Maidstone: they are originally held at each place alternately, and then adjourned to the other. Separate county rates are levied in, and are under the exclusive control of the justices of each division. They have distinct common gaols; that for the Eastern at St. Dunstan's near Canterbury, the other for the Western at Maidstone. They have also separate Bridewells. Each district has borne the expense of maintaining (and rebuilding when necessary) its own gaol, sessions house, house of correction, bridges, and other county burthens. Before 1735 there was no gaol for the reception of debtors in the Western division; in consequence of which an Act was passed in the 9 Geo. II. c. 12, intitled "An Act to enable the justices of the peace acting for the Western division of the county of Kent to purchase a convenient piece of ground for building a gaol for the said county, and for impowering the said justices to apply part of the county stock of the said division towards the same." That Act also speaks of the county gaol for the said division. Formerly the Eastern division bore the expense of the prisoners no longer than till they were delivered into the custody of the Maidstone gaoler; but a few years ago the Eastern Kent justices

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allowed the reasonableness of their defraying the expenses of prisoners from East Kent division, removed for trial to Maidstone, and there detained either as a punishment, or continued there till execution or transportation; and they paid the bills of the West Kent gaoler for bread, &c. Thus it continued till 1791; when the justices for the West Kent division thought that the only gaol for the county was at Maidstone, and insisted on a right to call on the East Kent division for their proportion of the expenses, which is the cause of the present dispute.

[170] *Bearcroft*, *Fielding*, *Gibbs*, and *Harvey*, shewed cause against the rule:

The Court will never grant this writ where there is any other specific remedy; and here if the treasurer has done wrong in disobeying the order, he may be prosecuted in the ordinary mode of indictment. Besides, the convenience of the county requires that the divisions of the Eastern and Western districts, which have immemorially existed, should not now be broken in upon; and the Court ought not to lend their aid to introduce so much confusion into the county, but leave the parties to their ordinary remedy.

The COURT then desired to hear the other side in answer to this preliminary objection.

Erskine and *Palmer*, *contrà*, said that every expedient had been considered for putting this matter into the most proper train for being determined with the least inconvenience to the county in general; and none appeared more likely to conduce to so desirable an end as the present. That though it might not be usual to apply for a mandamus to an inferior officer to obey an order of magistrates, yet considering who the real litigants were in this case, it was thought important enough in its nature to warrant the special interference of this Court; being a matter touching the good government and general administration of justice in the county of Kent. Besides, there were great difficulties in the way of a prosecution by indictment on account of the Grand Jurors who were to find the bill, all of whom must be directly interested in the decision one way or other; the probable consequence of which would be that no bill would ever be found.

LORD KENYON, Ch. J.:

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It has been often said by Lord MANSFIELD that a mandamus was a very beneficial writ, and that the best method of preserving it was to be sparing in the use of it. That caution cannot be more properly applied to any case than the present; though there does not appear to me to be any great difficulty in it. This Court have no difficulty upon a proper case laid before them in granting a mandamus to justices to make an order, when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order; we might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him, as to grant this application to the treasurer to obey the order in question. It was indeed once made a question, whether the disobedience of an order of justices was an indictable *offence; [*171] but since the case of *The King* v. *Robinson*,† that point has not been doubted. The prosecutors must pursue the ordinary remedy in this case by an indictment.

Per CURIAM:

Rule discharged.

WHITE *v.* CUYLER.

(6 T. R. 176—177.)

1795. *Feb.* 6.

[176]

If a feme covert without any authority from her husband contract with a servant by deed, the servant having performed the service stipulated, may maintain assumpsit against the husband. A person executing a deed for his principal under a power of attorney should sign in the name of the principal. The deed of a surety does not extinguish the simple contract debt of the principal.

BY articles of agreement under seal between Mrs. Cuyler, the defendant's wife, and a Mr. Low, of the one part, and the plaintiff of the other part, Mrs. Cuyler agreed to take the plaintiff with her to Barbadoes in the capacity of a waiting maid, to pay her 21*l.* per annum as long as she continued in her service, and to pay for her passage to Barbadoes, and other incidental expenses that might arise in the course of the voyage, as also her passage home to England in case Mrs. Cuyler should

† 2 Burr. 799.

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dismiss her from the service. The plaintiff thereby agreed to enter into Mrs. Cuyler's service, and if she left it without Mrs. Cuyler's consent, not to call upon Mrs. Cuyler for the expense of the passage back to England. Mrs. Cuyler not having paid the plaintiff's passage home from Barbadoes, the plaintiff brought an action of assumpsit against the defendant. On the trial before Lord Kenyon it appeared in evidence that when Mrs. Cuyler entered into the engagement she was about to sail to Barbadoes from this country with her husband General Cuyler, but it did not appear that she was acting under any written authority from the General. The defendant's counsel objected that the action was misconceived, for that the plaintiff should have sued upon the deed. Lord KENYON over-ruled the objection, giving the defendant leave to move to enter a nonsuit, if this Court should be of opinion that the action could not be supported; and the plaintiff obtained a verdict.

A rule having been accordingly obtained to set aside the verdict, and to enter a nonsuit;

Erskine and *Barrow* were now to have opposed it; but

Garrow and *Onslow*, *contrà*, were called upon to support it:

They admitted that the covenant of Mrs. Cuyler, as far as it respected her, was void, on account of her coverture; but contended, first, that it bound General Cuyler, the defendant, inasmuch as Mrs. Cuyler acted as attorney or agent for her [*177] *husband; or, 2ndly, if void as to him, that the deed was good against Low, who was a guarantee of the contract; for though there was no express covenant by him, yet by his joining Mrs. Cuyler, in the deed, he made himself liable to all the covenants on her part. That in *Branch* v. *Ewington* † where the father joined his son in an indenture of apprenticeship, the former was held answerable for every thing that was to be performed by the son, though he had not made himself liable by any express covenant in the indenture. And that if in this case either General Cuyler, or Low, could be sued on the covenant, the present action of assumpsit could not be maintained.

† Doug. 518, octavo ed.

LORD KENYON, Ch. J.:

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On the merits of this cause, I should have been as well satisfied with a verdict for the defendant; the jury however have determined that point. But as to the form of the action, I am of opinion that assumpsit will lie. The covenant by Mrs. Cuyler cannot bind her husband, she having no authority to bind him by a deed. Besides, in executing a deed for the principal under a power of attorney, the proper way is to sign in the name of the principal.* And with regard to Low, the contract of a guarantee or surety under seal does not, by operation of law, extinguish the debt of the principal.†

Per CURIAM:

Rule discharged.

THE KING *v.* THE INHABITANTS OF THE COUNTY OF CUMBERLAND.

(6 T. R. 194—198.)

1795. *Feb.* 10.

[194]

An indictment for not repairing a county bridge may be removed by *certiorari*, notwithstanding the stat. 1 An. c. 18, s. 5. Those who are bound to repair a bridge are bound to widen it, if the exigencies of the public require it.

THIS case having stood over for consideration,

Lord KENYON, Ch. J. now delivered the opinion of the Court, in which he said that Mr. J. GROSE and Mr. J. LAWRENCE, who were both absent on account of indisposition, concurred:

This was an indictment found at the assizes against the defendants, stating that Blenherhasset Bridge was a public bridge over the river Ellen, used for carriages &c. and that it was too narrow, and the battlements not of sufficient height &c.; and charging that the defendants ought to repair it and make it secure. The indictment was returned into this Court in Hilary Term, 32 Geo. III. in obedience to a writ of *certiorari* issued at the instance of the prosecutor; and the defendants,

* *Vide Combe's* case, 9 Co. 76, b; *Frontier* v. *Small*, 2 Lord Raym. 1418, and 1 Stra. 705.

† *Vide* 2 Leon. 110.

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having pleaded the general issue, were tried † at the summer assizes, 1792, for the county of Cumberland, when a verdict was found for the King. In Michaelmas Term, 1792, the defendants obtained a rule for a new trial, which on shewing cause in the following term was discharged; on that argument, a question was discussed respecting the liability of the inhabitants of a county to widen a bridge, which was not of sufficient width to answer the present exigencies of the public; the cause was arrived at that stage, when, though no positive opinion was given by us,‡ the Court strongly intimated that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge. And upon that question there cannot be entertained much doubt: but that is not now the question to be decided. The question now for the consideration of the Court, [*195] and which arose upon a *motion § made by the prosecutors that a fine of 350*l.* might be imposed on the defendants and paid to W. Lawson to be laid out in repairing the bridge, is whether or not an indictment of this kind can be removed by *certiorari*. In order to shew that it cannot, the defendants relied on the stat. 1 Ann. c. 18, s. 5, by which it is enacted "that all matters concerning the repairing and mending of the bridges and highways hereinbefore mentioned shall be determined in the county where they lie, and not elsewhere; and that no presentment or indictment for not repairing such bridges or the highways at the end of such bridges, shall be removed by *certiorari* out of the said county into any other Court." The

† Before Mr. Baron Thompson at Carlisle.

‡ The rule for a new trial was moved for on the ground that the defendants were not bound by law to widen the bridge, and on a supposition that there was no evidence to shew that the bridge was in other respects out of repair; but on the report of the learned judge it appeared that there was evidence of the bridge being out of repair; and therefore the rule for a new trial was discharged. The Court saying that at all events the defendants must be found guilty on a second trial.

§ This rule was obtained in Hil. Term, 1793; and the question was argued in East. and Trin. Terms, 33 Geo. III. by *Law* and *Chambre* in support of the rule, and *Wood contrà*.

prosecutor contended that this clause was intended only to prevent the defendants removing such presentments or indictments, and not to take away the *certiorari* from the prosecutor. The words of this Act of Parliament are very general: but if in the construction we were to read them in their full extent, it would introduce a solecism in the law; for it must be remembered that in these cases the defendants are the inhabitants of a county, and if the indictment cannot be removed by *certiorari*, and a suggestion entered on the record that the inhabitants of the county are interested in order to have the trial elsewhere, the indictment must be tried by the very persons who are parties in the cause. This, I believe, would be an anomalous case in the law of England. However, this question does not rest on that general observation. If this were *res integra*, we should consider whether the extensive words of this statute ought not to be narrowed in their construction, in order to arrive at that point which is the object of all laws, the attainment of justice. Now in support of the construction contended for by the prosecutor, that the statute does not prevent the removal of this indictment, many instances have been furnished by the officers of the Crown Office of informations and indictments for the non-repair of bridges having been removed by writs of *certiorari* applied for by the prosecutors. Of the first sort is that of *The King* v. *The Inhabitants of the county of Wilts*, E. 2 An., for not repairing a foot-bridge over the river Avon. This case is reported in 6 Mod. 191, and 307; and in Salk. 350, where it appears that the Court directed a suggestion to be entered on the *record in order that the trial might be had in Berkshire; [*196] and although a new trial was moved for on other grounds, no objection was taken to the jurisdiction of the Court. Other instances of informations having been removed here are, *R.* v. *The Inhabitants of the county of Middlesex*, Hil. 4 An. for not repairing Brampte bridge; *R.* v. *The Inhabitants of the city of Norwich*, E. 2 Geo. I., for not repairing Harford bridge; *R.* v. *The Inhabitants of the county of Norfolk*, Mich. 8 Geo. I., for not repairing Trowse bridge; *R.* v. *The Inhabitants of the county of Surrey*, E. 9 Geo. I., for not repairing the bridge between Mitcham and Sutton; and *R.* v. *the Inhabitants of the*

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county of Stafford, Mich. 6 Geo. II., for not repairing Yoxall and Trent bridges. The other class of cases referred to was that of indictments, removed here by *certiorari* at the instance of the prosecutor; in several of which the trial was ordered to be had in another county. *R.* v. *The Inhabitants of the county of Lancaster*, E. 3 An. for not repairing Burton bridge; *R.* v. *The Inhabitants of the West Riding of Yorkshire*, E. 8 Geo. III., for not repairing Glusburne Beck bridge; in this case the Court, after argument, refused a new trial, as appears by the report of it in 5 Burr. 2594; *R.* v. *The same defendants*, Tr. 27 Geo III., for not repairing another bridge; *R.* v. *The Inhabitants of the county of Glamorgan*, in the same Term, for not repairing Pyle bridge; *R.* v. *The same defendants*, Hil. 28 Geo. III., for not repairing Ynispeullwck bridge; *R.* v. *The Inhabitants of the county of Somerset*, Mich. 29 Geo. III., for not repairing Exbridge; *R.* v. *The Inhabitants of the county of Lancaster*, E. 30 Geo. III., for not repairing Rawtonstall bridge; *R.* v. *The Inhabitants of the county of Chester*, Mich. 32 Geo. III., for not repairing Burley Dam bridge; *R.* v. *The same defendants* in the same Term, for not repairing Walk Mill bridge. And it is to be observed that some of these cases happened soon after the passing of the statute of Anne, and while it must have been in the recollection of those who attended in the Courts. Among the book cases cited by the prosecutor's counsel was that of *R.* v. *Farewell*, 2 Stra. 1209. There the prosecutor took out a *certiorari*, and the defendant moved to quash it, because there was no affidavit according to the stat. 5 W. & M. c. 11, nor any recognizance according to that; and the former stat. 13 & 14 Car. II. c. 6; 22 Car. II. c. 12; & 3 W. & M. c. 12. "But the Court, on considering those Acts, held that they related only to *certioraris* applied for *by defendants and not to one *pro rege*, as that was. And many precedents were shewn of *certioraris* for a prosecutor taken out in the manner this was, and the *certiorari* was allowed." The words of the statutes there referred to are as large as those of the statute of Anne, upon which this question arises; and yet the Court held in that case that they only extended to defendants, and that a prosecutor who removed the indictment was not bound to comply with those conditions which

[*197]

the several statutes seemed to require from every person removing an indictment by *certiorari*. We have also been furnished with a note of the above case, taken by the late Mr. Masterman of the Crown Office, by which it appears that before the Court gave their opinion as stated in Str. 1209, Lord Ch. J. LEE said "enlarge the rule for a day or two, and we will look into the several Acts of Parliament; but I own I never knew an instance where an affidavit in such a case as this was made by or expected from a prosecutor, or any recognizance entered into;" and Mr. J. CHAPPLE, "said the legislature never intended by these Acts of Parliament to lay the prosecutor under any hardships or difficulties." This case has been recognized in subsequent cases, particularly in that of *R.* v. *Bodenham*, reported in Cowp. 78. That was an indictment on the stat. 13 Geo. III. c. 78, for a nuisance in a highway; the prosecutor had taken out a *certiorari*, which the defendants had moved to supersede; and upon shewing cause why a *procedendo* should not issue, *Mr. Wallace* insisted that the twenty-fourth section of that statute, which provides "that no indictment or presentment shall be removed by *certiorari* till such indictment be traversed and judgment thereupon given," did not extend to the Crown, but only to a *certiorari* at the instance of a defendant; that the above clause was copied from the stat. 22 Car II. c. 12, s. 4, which was held in *R.* v. *Farewell* not to extend to a *certiorari* by a prosecutor, and the Court decided that the clause was only introduced to prevent defendants bringing a *certiorari* for delay. Therefore on the authority of all these cases, whatever might have been our opinion if it had been *res integra*, [though in forming an opinion for the first time on the subject we should have been anxious for reasons of substantial justice to have controlled the extensive operation of the general words of the statute of Anne,] we are of opinion that the *certiorari* was *properly issued, and that the rule for imposing the fine must be *made absolute*.† [*198]

† *Vid. R.* v. *R. Davies* and others, 2 R. R. 683.

1795.
Feb. 11.

[200]

CAMPBELL *v.* FRENCH AND HOBSON.

IN ERROR.

(6 T. R. 200—213.)

A bill of exchange payable sixty days after sight becomes due sixty days after acceptance, or after protest for non-acceptance. Where a bond is made, with a condition to be void if something is done which, in the event turns out impracticable, the condition is not satisfied by doing what is practicable towards the end intended.

Therefore where a bill was drawn by A. in England on B. at Bombay, payable sixty days after sight, and a bond given to C. (the indorsee), with condition to be void if the bill should be paid at Bombay, or paid here by the obligor within thirty days after the bill should be produced to him after being sent back here protested for non-payment, and before the bill arrived at Bombay the drawee had left that place, and his agent refused to accept it when it did arrive; it was held that the bond was not forfeited by the obligor refusing to accept the bill thirty days after it was returned to England protested for non-acceptance.

[THIS was an action of debt, brought in the Court of Common Pleas, on certain bonds, in which the Court of Common Pleas on a demurrer gave judgment for the defendants. Error having been brought, the case was argued at length before this Court. The nature of the questions argued so far as the case is of any general interest, will sufficiently appear from the judgment.

Cur. adv. vult.]

[210] Lord KENYON, Ch. J. now delivered the opinion of the Court, in which his lordship observed the other judges who were not now present concurred. * * *

By these bonds the obligors undertook to pay the several sums of money, for which the respective bonds were given, if a certain [*211] thing were performed in India, namely, if the several *bills mentioned in the conditions of those bonds were sent back to England duly protested for want of payment. The subsequent parts of the record shew that these bills did come back to England, not having been protested in India for want of payment, the respective parties on whom they were drawn, and who ought to have paid them, not being in India when the bills arrived there. It also appears upon the record that after the bills were returned to England, all the care that could be taken was taken to enforce the payment of them, but that payment

could not be obtained. The question therefore is, Whether that which was done in this case, can be substituted in lieu of that which the parties to this contract undertook should be done before the bonds were to be enforced? It must be remembered that the plaintiff in error, who entered into these bonds, was not the original debtor; he was applied to to come in and add his security to the security of the different bills; and when he consented to enter into that security, he expressly stipulated as to the terms upon which he was to become responsible, and no one has a right to superadd any condition to the condition which he entered into, or to alter it. The general law respecting conditions is extremely well settled in a vast variety of books and cases; and without detailing them, it is sufficient to say that they will be found in Rolle's Abridgment, and in Coke upon Littleton; and the uncontrolled result from them all is, that if the condition be an impossible condition, the bond becomes single, but if the condition be only improbable, as in the instance put, if the Pope of Rome should come here to-morrow, yet that condition is a good condition however improbable it may be. Now taking that to be the ground on which we are to proceed, let us see what the parties to this contract stipulated should be done, what might have been done, and what in point of fact was done. They expressly agreed in terms that the several bills should be sent back from India protested for want of payment before the bonds were to take effect. This appears to me to have taken hold of the mind of the learned Chief Justice of the Common Pleas when he delivered his opinion; and it seems by what he states that he had some difficulties to struggle with before he got rid of that objection; but I confess that to this moment I, and those I have the honour of conferring with on this bench, have not been able to get rid of the objection. In order to shew that the conditions to those bonds were impossible conditions, it was doubted whether that protest *which the con- [*212] ditions of the bonds require to be made could be made in point of law: but I am glad that upon this point we are fortified with authorities to shew that this protest might have been made. I will mention two passages from different books upon this point. The first is from a book which upon questions of this kind has

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CAMPBELL v. FRENCH. In Error.

always been treated with considerable respect, though not the production of a lawyer: it was written in early times by a person conversant with the custom of merchants respecting bills of exchange; the rules laid down by him have been since received by the mercantile world; and his book has been frequently referred to by courts of justice and by the most able authors treating upon commercial subjects; I mean Marius. He says† "a bill payable at so many days' sight is to be accounted so many days next after the bill shall be accepted, or else protested for non-acceptance, and not from the date of the bill, nor from the day that the same came to hand, or was privately exhibited to the party on whom it is drawn to be accepted, if he do not accept thereof: for the sight must appear in a legal way, which is approved either by the parties underwriting the bill, accepting thereof, or by protest made for non-acceptance." The other case is to be found in 1 Lord Raym. 742; it is there an anonymous case, and it is said at the bottom to have been from the relation of Mr. Place, who was a man of great learning and the avowed author of Watson's Clergyman's Law. "The custom of merchants is, that if B., upon whom a bill of exchange is drawn, abscond before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of B.; and after time of payment is incurred, then it ought to be protested for non-payment the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. Proved by merchants at Guildhall, Trin. 6 W. & M. before Treby, Chief Justice." This being the case, it appears to me that the argument here is arrived at its conclusion, if we were warranted in taking the ground that I took before, namely, that it is not sufficient to render a bond single, that the condition is improbable and that if the condition be not impossible it must be complied with; for if so, that which was required by the plaintiff in error when he entered into these bonds (even if capriciously required,) should have been complied with before the bonds *can be put in force. The bills in question were protested for non-acceptance, and might have been protested for

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† Marius, page 19, edition 1656.

non-payment in India. The plaintiff in error, who entered into the contract imposing these terms upon his contract, and subscribing it with that limitation and that condition, had a right to impose those terms; and if any person tell him that he acceded to other terms, he has a right to answer, "This is not my contract; *non hæc in fœdera veni;* do not impose upon me other conditions than those I have imposed upon myself by the contract I have entered into."

If this case had been foreseen, perhaps the condition would have been adapted to the case; but we are now construing a strict legal instrument, to which legal effect may be given. And after giving it the best consideration we can, and with very great respect for the judges of the Court of Common Pleas from whose opinion we differ, we are of opinion that the plaintiffs below are not entitled to recover on the two last counts in the declaration, and consequently that the judgment given in the Common Pleas upon those counts must be reversed.

Judgment reversed.

1795.
Jan. 27.
[213]

JOHN SOUTHEY SOMERVILLE *v.* MARY LETHBRIDGE, THE HONOURABLE HUGH SOMERVILLE, HENRY FOWNES LUTTRELL, WILLIAM SOUTHEY, ROBERT SOUTHEY, THOMAS SOUTHEY, JOHN SOUTHEY, AND SARAH PERIAM.

(6 T. R. 213—216.)

Under a devise of lands to trustees in fee in trust for A. (an infant) for ninety-nine years if he shall so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of ninety-nine years, as they shall be in seniority of birth, and in default of such issue male in him or them, then to B. and the issue male of his body for the like term of ninety-nine years, and in default of such issue male then to the right heirs of the devisor, A. takes an estate for ninety-nine years determinable with his life, and upon his death his first son takes a like estate; but the subsequent limitations to his other sons and to B. are void.

CANNON SOUTHEY being seised and possessed of freehold, copyhold, and leasehold estates, by will dated 30th May, 1767,

1795.

SOMERVILLE v. LETHBRIDGE and others.

duly executed to pass real estate, after giving certain legacies, devised "all the rest of his estates and lands both in possession and reversion, and all his reputed manors and fee-simple estates, and all other his copyhold and leasehold estates not before devised, to the defendants Hugh Somerville and H. F. Luttrell, and the survivor, &c., in fee, in trust to preserve contingent remainders; and as to all his fee-simple, copyhold, and leasehold estates in the parishes of Fitzhead, &c. and elsewhere in the [*214] county of *Somerset, (except the annuity therein before given to S. Periam, and the leasehold estate given to William and Hannah Southey,) in trust to and for the use of his great nephew J. S. Somerville, (the plaintiff,) for the term of 99 years if he should so long live, and after that term to the use of the first, second, third, and fourth sons of the said J. S. S. and the issue male of their bodies lawfully begotten for the like term of 99 years, as they should be in seniority of birth; and in default of such issue male in him or them, then to the use of his kinsman John Southey and the issue male of his body lawfully begotten for the like term of 99 years; and in default of issue male of him, then to his brother Robert Southey and the male issue of him for the like term, and in default of issue male of him, to the devisor's right heirs: But in case his said grand nephew J. S. Somerville should die without issue male, or should at any time thereafter possess or enjoy the title and estates belonging to or settled upon the Somervilles, then he ordered and directed his trustees to permit and suffer the said John Southey, if living, if not, Robert and Thomas Southey in the succession of age, to possess and enjoy his mansion-house and the estates thereto belonging, and two fields, (naming them), with all such furniture therein, and all his plate which should be necessary for ornament and house-keeping, and not to be disposed of, &c.; with a direction that the deer in the park should be kept up for the benefit of his executrix. And in case his said nephew J. S. Somerville should not think proper to dwell and inhabit in his said mansion-house after he should arrive at the age of 21, that then it should be possessed by the said John Southey or his brothers in succession as before mentioned. And he directed that the copy be kept filled up with three lives in his said home-estate and mansion-house, and that

the fines for renewal or adding any life or lives should be paid out of the rents and profits of his lands in fee, so as no female life be added or put into the copy. He also appointed Hugh Somerville and H. F. Luttrell trustees of his will to and for the several trusts and uses before mentioned. And he thereby appointed John Southey to be a receiver of the rents and profits of his estates; and ordered him to pass an account annually to the said trustees for the income and produce of his estates, that such produce might be placed out on government securities until lands of inheritance *could be purchased, which he empowered his [*215] trustees to do whenever they should think proper, so as the same be applied and settled to the same uses as his other lands before settled, and for his so doing gave John Southey a salary of 20*l.* a-year." He then bequeathed the rest and residue of his personal estate and monies to his sister Mary Lethbridge, whom he appointed sole executrix, she first paying all his debts, legacies, and funeral expenses. The devisor died on 7th July, 1768, without issue, leaving the defendant Mary Lethbridge his heiress at law; and she being now dead the plaintiff is heir at law to both. This suit having been instituted in Chancery during the minority of the plaintiff, and the rents having accumulated considerably during that time, an application was made to lay out the amount in the purchase of an estate to be settled according to the directions in the will, namely, to the same uses as the lands devised by the will. An order of the Court of Chancery having been made accordingly, and a settlement prepared by one of the Masters to whom the cause was referred, exceptions were taken to his report; and the Court directed this case to be stated for the opinion of the Court of King's Bench upon the following questions: 1st, What estate the plaintiff John Southey Somerville† takes under the will of the devisor in his freehold, copyhold, and leasehold estates respectively? 2nd, What estate the first son of the plaintiff will take under such will? 3rd, Whether the second, third, and fourth sons of the plaintiff will take any and what estates under such will? 4th, Whether any other sons of the

† Though it was not directly stated in the case that J. S. Somerville had no children when the will took effect, that circumstance appeared from the different dates, he being a minor and unmarried.

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plaintiff will take any and what estates under such will? 5th, What estate the defendant John Southey takes under the said will? 6th, Whether the issue male of John Southey can take any and what estates under such will? 7th, What estates the defendants Robert and Thomas Southey take under the said will? and whether their issue male can take any and what estates under the said will? 8th, Whether Hugh Somerville and H. F. Luttrell took any and what estate under the said will?

The matter was shortly spoken to at the bar by *Gibbs* for the plaintiff, and *Cooke* for the defendants: and afterwards the following certificate was sent to the Court of Chancery:

[216] "Having heard counsel in the case above referred to us, we are of opinion, that Hugh Somerville and Henry Fownes Luttrell took a fee simple in the freehold and copyhold estates, according to their respective natures, and the absolute interest in the leasehold estates devised to them by the will of the testator Cannon Southey, subject however to the trusts of the said will; and that none of the subsequent limitations are limitations of uses executed by the statute. If the subsequent limitations had been limitations of uses executed by the statute, we are of opinion that John Southey Somerville would have taken an estate for a term of 99 years determinable with his life in the freehold and copyhold estates of the testator, and in his leasehold estates if they should so long continue; and that upon his death his first son would take a like estate for a term of 99 years, determinable with his life in the freehold and copyhold estates, and in the remainders of the leasehold estates; and that the several subsequent limitations to the 2nd, 3rd, and 4th sons of the said John Southey Somerville, and the limitations to the defendant John Southey and his issue male, and the limitations to Robert and Thomas Southey and their issue male, would be void; and that the other sons of the plaintiff John Southey Somerville would not take any estate under the testator's will.

"KENYON,
"W. H. ASHHURST,
"N. GROSE,
"S. LAWRENCE."

K. B. EASTER TERM.

GOODRIGHT DEM. CHARTER *v.* CORDWENT.

(6 T. R. 219—221.)

1795. *April* 22.

If a landlord receive rent due after the expiration of a notice to quit, it is a waiver of that notice.

THIS ejectment was brought in 1793 to recover the possession of an estate at Bishop's Lydeard, in Somersetshire, and was tried at the last Taunton Assizes before Lawrence, J.; when it appeared that the lessor of the plaintiff gave the defendant, who was his tenant from year to year, regular notice to quit at Old Michaelmas, 1792, but that afterwards the defendant paid him half a year's rent due 5th of April, *1793, which it was contended (on behalf [*220] of the defendant) was a waiver of the notice to quit. The learned judge left it to the jury to say, whether the money were received as rent, in which case they should consider it as an acknowledgment of the tenancy after the expiration of the notice to quit, and should find a verdict for the defendant, or as a satisfaction for damages paid by the defendant as a trespasser, in which case they should find a verdict for the plaintiff; and he added that he thought that the circumstance of the ejectment having been brought in 1793, and not tried till 1795, was an additional reason to induce them to believe that the lessor of the plaintiff had waived his notice to quit. The jury found a verdict for the defendant; which

Gibbs now moved to set aside, on the ground that the receipt of money after the expiration of the notice to quit did not operate as a waiver of that notice, but should be considered as a compensation by the defendant to the lessor of the plaintiff for the damage done by the former as a trespasser, and which the latter might have recovered in another form of action. And he cited *Doe* d. *Cheney* v. *Batten*, Cowp. 243; and *Brewer* d. *Lord Onslow* v. *Eaton*,† in the latter of which it was held that the lessor of the

† 23 Geo. III. B. R., on a motion for a new trial, the point having been reserved at the trial.

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GOODRIGHT v. CORDWENT.

plaintiff had not waived his re-entry on a forfeiture incurred by non-payment of rent by taking an insufficient distress for that rent; and Lord MANSFIELD, Ch. J. said, "It is like the receipt of rent after the demise, about which there was so long a puzzle. That is now finally settled to be no objection. It is receiving what the landlord might recover in an action for the mesne profits."

LORD KENYON, Ch. J.:

If the defendant had paid, and the lessor of the plaintiff had received, the money as a satisfaction for the injury done by the defendant, in continuing on the plaintiff's land as a trespasser, then the plaintiff might have recovered in ejectment. But if it were paid *eo nomine* as rent, and received as such, and the jury have found that it was so, I cannot assent to the doctrine laid down in the cases cited, that the receipt of rent accruing after the expiration of the notice to quit is not a waiver of it; for according to that doctrine the same person might stand in the relation of tenant and trespasser to his landlord at the same time. This [*221] case has frequently occurred at Nisi Prius since I have *set here, and the point has always been determined agreeably to the opinion given by the judge at this trial without being disputed.

The other Judges concurring,

The rule was refused.†

1795.
April 25.
[221]

BLAKE *v.* LANYON.

(6 T. R. 221—222.)

An action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know when he employed him that he was the servant of another.

THE first count in the declaration stated that the plaintiff, who was a currier, had hired and retained W. Hobbs to be his servant and journeyman, &c. and that the defendant persuaded and

† *Vide Zouch* d. *Ward* v. *Willingale*, 2 R. R. 770.

enticed Hobbs to leave his service, &c. In the second count it was alleged that Hobbs, while he was so hired and employed by the plaintiff in his trade as such servant, &c. wilfully and without the leave or licence and against the will of the plaintiff, departed and absented himself from and left the service of the plaintiff, &c. and then and there went to the defendant; yet the defendant well knowing Hobbs to be the servant of the plaintiff, and to have been and to be so retained, hired, and employed by the plaintiff, &c. but contriving, &c. "did then and there receive and harbour the said W. Hobbs, and did then and there retain, keep, and employ the said Hobbs in his (defendant's) said service, and wholly refused to deliver him to the plaintiff his master, although requested, &c. and unlawfully detained, entertained, and kept the said Hobbs, so then being the servant and journeyman of the plaintiff, in his (the defendant's) service, &c., whereby, &c. At the trial at the last Launceston assizes it appeared that Hobbs, who was retained by the plaintiff to work by the piece, left the plaintiff's service on a dispute between them, the plaintiff having beaten him; that at the time of his departure he had some work in hand; that he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff; but that in the course of a few days afterwards the defendant, having been apprised by the plaintiff that Hobbs was his servant, and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work: this Hobbs refused, and the defendant continued him in his service. No evidence being *given in support of the first count; it was [*222] objected on behalf of the defendant that the action could not be supported on the second count, because it either imported that the defendant had retained Hobbs in his service, knowing him to be the servant of the plaintiff, which was not established in proof, or that he merely continued Hobbs in his service after he had notice of Hobbs's engagement with the plaintiff, for which no action could be maintained, it appearing that the defendant did not know that Hobbs was the plaintiff's servant, at the time he first employed him. But Mr. J. LAWRENCE, before whom the

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case was tried, over-ruled the objection, saying that the plaintiff might recover upon the second count, if the jury were of opinion that the defendant continued to employ Hobbs after he knew that Hobbs was the plaintiff's servant. The jury having given a verdict for the plaintiff;

Gibbs now renewed his objection, and moved either to enter a nonsuit, or to arrest the judgment; stating that great inconveniencies would result from a determination against the defendant, for that in such a case a person engaged in a great manufacture might be deprived of the benefit of the service of a journeyman whom he had retained to do a particular piece of work, not knowing at the time of hiring that the journeyman was under any engagement with any other master, before the servant had finished his work, and at a moment when the materials then in work might be totally spoiled if left in an unfinished state. And he cited *Adams* v. *Bafeald*,* where it was held by TANSFIELD, J. and FENNER, J. against the opinion of GAWDY, J. that an action does not lie for retaining the servant of another, unless he procure the servant to leave his first master.

Sed per CURIAM:

An action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away. Here no fault could be imputed to the defendant, for taking Hobbs into his service in the first instance, because then he had no notice of Hobbs's prior engagement with the plaintiff: but as soon as he had notice of that fact, he ought to have discharged him. A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service.

Rule refused.

* 1 Leon. 240.

JAMES *v.* GREEN AND OTHERS.

(6 T. R. 228—233.)

1795. *April* 28.

[228]

A high constable may be appointed, and a county rate levied, *de novo*, for a town erected into a county of itself by charter many years before. A building given by the corporation for the purpose of a house of correction about seventy years ago, and maintained by them to the present time, is not a house of correction within the exception of the 17 Geo. II. c. 5, s. 31, liable to be maintained by the corporation; but the public may be called upon to support it by a county rate.

THE defendants were the justices of the peace and the high constable of the county of the town of Nottingham; and this action of trespass was brought against them for breaking and entering the house of the plaintiff situate in the town and county of the town of Nottingham, and taking and carrying away his goods; to which they pleaded the general issue. At the trial a verdict was found for the plaintiff against all the defendants, except Howard the high constable, subject to the opinion of this Court on the following case. On the 16th January, 1794, at the general Quarter Sessions for the town and county of the town of Nottingham, before the mayor, and aldermen, the justices, J. Howard, one of the defendants, was appointed high constable of the town and county of, &c. for the ensuing year, for the special purpose of collecting and raising from the churchwardens and overseers of the poor of each parish within the town, &c. the rates and assessments to be levied in the nature of a county rate. At the same sessions W. Merry was appointed treasurer to receive such sums as the high constable should collect by virtue of such rates to be levied in the nature of county rates, which should be deemed to be a public stock, subject to the legal order of the said justices at their general quarter sessions. At the same time the justices ordered 50*l.* to be assessed upon the town and county, &c. in a certain proportion upon the three several parishes in the nature of a county rate, for the relief of prisoners in the gaol, for the relief of prisoners in the King's Bench and Marshalsea prisons, repairing and furnishing the house of correction, with *the keeper's salary, the treasurer's salary, the [*229] charges concerning vagrants, soldiers' carriages, convicting and transporting felons, and other charges to which the same was by

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law applicable within the same town. The case then stated the order to the high constable to collect and pay to the treasurer, his precept to the plaintiff, one of the overseers of one of the parishes, to collect the rate, the non-payment of the rate and the certificate of such non-payment to the justices, who thereupon issued their warrant of distress, under which the high constable entered the plaintiff's house and distrained his goods. The town of Nottingham was formerly part of the county of Nottingham, and the burgesses were a corporation by prescription, and from time immemorial have had a gaol in the town, which was under the custody of those who had the custody of the town. Henry VI. by his charter in the 27th year of his reign recited and confirmed various charters granted by former kings to the town, and particularly one of Edward III., in 1378, reciting an inquisition, in which it was found that the burgesses of Nottingham had immemorially had a gaol, and also a charter of Henry IV., in 1399, granted to the mayor, bailiffs and burgesses cognizance of all pleas by the mayor and bailiffs for the time being, and granting to them the goods of felons and fugitives, and all fines and amerciaments: and the same charter, after a grant concerning the return of writs within the town, contains these words: "Concessimus etiam pro nobis et hæredibus nostris ex certâ scientiâ nostrâ et de assensu prædicto eisdem majori ballivis et burgensibus ac eorum hæredibus et successoribus quod ipsi se appropriare et commodum suum facere possint de omnibus purpresturis tam in terris quam in aquis factis vel faciendis, et de omnibus vastis infra limites et bundas villæ prædictæ *in supportationem onerum infra villam prædictam indies emergentium.*" It then proceeds to grant to the mayor, recorder and four others, full power and authority to hear and determine all matters appertaining to the office of a justice of the peace, with a non-intromittant clause to the justices of the county. Hen. VI., by his said charter, incorporated the town, by the name of the mayor and burgesses of the town of Nottingham, and made it a county of itself, and directed that in future they should have sheriffs instead of bailiffs, and granted a county court to the sheriffs, and a court to hear all suits real, personal and mixed before the mayor, his deputy and the sheriffs, and

also granted the *goods of felons attainted and outlawed, &c. forfeitures of recognizances, &c. The same charter further granted that the aldermen, from whom the mayor is to be chosen, should be justices of the peace, and that any three (of whom the mayor to be one) should have full power to hear and determine all felonies, murders, trespasses, &c. within the cognizance of justices of the peace; and granted to the burgesses of the town all fines, forfeitures, and amerciaments, which might arise in the said court "in auxilium et supportationem grandium onerum eidem villæ indies incumbentium, aut in eâdem contingentium et emergentium." This charter also contains a proviso that the acceptance thereof and of the privileges under it should not impeach or alter any of the privileges which they had under former charters. This charter as well as those recited in and confirmed by it were accepted by the corporation. No power is expressly given by any of the charters to appoint a high constable or treasurer, and no high constable or treasurer was ever appointed before the present, or any county or other rate in the nature of a county rate made within the town until the present. The parish of St. Mary, of which the plaintiff was overseer, have usually paid the constable for apprehending vagrants by order of one justice without any rate being made, and also for the support of the families of militia men under the last and former militia Acts for fifteen years; and all the other charges in the rate (except as above stated) have been paid by the corporation of Nottingham out of their own funds; and they are possessed of large estates. The corporation have always repaired the gaol of Nottingham. The house of hospitallers in Nottingham, part of the possessions of the dissolved monastery of St. John, and the lands belonging to it, were granted by Edw. VI. to the corporation of Nottingham for the purpose, as is expressed in the charter, of better enabling them to repair and sustain the bridges up the Trent. The corporation, about seventy years ago, converted the house into a house of correction, to which purpose it has been ever since applied; and the different keepers of it have always been appointed by the mayor for the time being. The inhabitants of the town of Nottingham have never contributed to the rate for the county at large.

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[The case having been argued by

Perceval for the plaintiff:

Reader, contrà, was stopped by the Court.]

[232] LORD KENYON, Ch. J.:

I have no doubt whatever upon this case. I thought the question intended to be agitated had been, whether the justices of Nottingham could appoint a high constable *de novo* to collect the county rate, no such officer having been ever appointed, and no rate having been collected before. It appears from the case that Nottingham was separated from the county at large, and made a county of itself by the charter of Henry VI.; and though it had no such officer as high constable before, yet I conceive that by the common law but certainly by the Statute of Winchester,† all officers of this nature are incident to the creation of such a district having separate jurisdiction. And it is no new thing, if we may have recourse to analogous cases, at this day to appoint officers in places where none were in fact appointed before, if by law such an appointment may be made. In the case of vills, the Court have in modern times frequently granted writs of mandamus to appoint overseers of the poor for the first time as soon as the exigencies of the place required it. So here when certain public expenses were to be defrayed, it was fit that proper officers should be [*233] appointed and rates collected for that purpose. Many of *these charges have arisen in latter times; and though the corporation, in whom the government of the place resides, might have thought proper, while such charges were small, to pay them out of their own funds, yet as they became more heavy, that could not preclude them from recurring to legal methods of raising supplies for that purpose from the public. Some person or other must be liable to these burthens; and I see no evidence what would sustain a prosecution against the corporation for not discharging such demands. The circumstance of their having hitherto taken this burthen on themselves will not of itself dis-

† 13 Ed. I. st. 2, c. 6; *vide* 4 Inst. 267. *The constable of Horneby's* case, 1 Mod. 13, and 2 Hawk. c. 10, s. 33.

charge other persons on whom the law has imposed that liability: besides, some of the charges, such as those relating to the gaol, are clearly deducible from the charters, and can afford no inference for extending the words relied upon to other burthens. As to the present house of correction, it seems the corporation gave their house of hospitallers for that purpose some years ago; other persons have given buildings for the like purpose: but it can never be argued from thence that such persons are therefore chargeable with all subsequent repairs and burthens incident thereto. The exception in the statute of the 17 Geo. II. does not apply to cases of this kind, but was inserted with reference to such persons as were bound by tenure, grant or prescription to keep up establishments of this nature, such as was till lately the case of Mr. Rolle in Devonshire, and others in the same situation. The circumstance relied on here of the mayor's having appointed the keeper can only be attributed to the curtesy and deference paid by the rest of the justices who are aldermen to him as their head. But what seems now to have been most relied on is some supposed illegality in the rate itself as expressed on the face of it. I should have been sorry that this case had been determined on any such ground, because the parties would probably have been put to the expense of another action in order to try the general question; and in that case they need not, and probably would not, have mentioned in the title of the rate all the specific purposes for which it was made. However, I see no objection to any of the purposes for which this rate is expressed to be made.

Per CURIAM: *Postea to the defendants.*

THE KING *v.* THE INHABITANTS OF ROACH.

(6 T. R. 247—254.)

1795. *May* 2.

[247]

An adult who leaves her father's house and goes into service becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father.

THE Court of Quarter Sessions for the county of Cornwall confirmed an order of two justices, for the removal of Elizabeth

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THE KING v. THE INHABITANTS OF ROACH.

Rounsavel from the parish of St. Columb Major to that of Roach, and stating the following case for the opinion of this Court:

The pauper was born in the parish of Little Colan, where her father then resided; when she was twelve years of age, her father rented some grist mills of the value of 14*l.* a year in the parish of Roach, and resided there with his family for several years. The pauper constantly lived with her father from her birth, and attained the age of twenty-one whilst living in Roach. When she was twenty-two years old she was delivered of a [*248] *bastard child; for the maintenance of which a bond of indemnity was given to the parish officers of Roach; and she continued still living with her father. About half a year afterwards she left her father's house, went to Mr. Henwood's, a farmer in the parish of Roach, as a wet-nurse to his child, and lived there eight weeks, for which she was paid 8*s.* A few days after the pauper left her father's house, he removed with his family to St. Columb, where he rented some grist mills at 12*l.* a year, and has lived thereon from that time. At the expiration of the eight weeks the pauper quitted the house of Mr. Henwood, and went to her father's in St. Columb, where she has since remained, but never made any contract with him as a servant, nor gained any settlement for herself, except as aforesaid.

[After argument:]

[251] LORD KENYON, Ch. J:

It has been very properly observed on former occasions that this Court ought to be anxious, in determining questions arising on the settlement laws, to lay down clear and distinct rules for [*252] the information of a very *useful class of persons, the magistrates, who are to decide on cases of this kind. And I hope that the rule of decision, which we are about to establish in this case, will fall in with every case that has been cited. For with regard to a supposed expression of mine in *R.* v. *Witton cum Twambrookes*,† there is an inaccuracy in it. I think I could not have said, because it never was my opinion, that the mere cir-

† 1 R. R. 717.

cumstance of a son's attaining the age of twenty-one was an emancipation so as to prevent his having a derivative settlement gained by his father afterwards, if the son continued to live with the father; for if the son, with unbroken continuance, remain with, and a member of, the father's family, he is not emancipated. But this proposition will not break in upon any of the cases, but may be reconciled with all of them, namely, that if a child under the age of twenty-one leaves his father's home, and is thereby *quâ* severed from his father's family, and returns to his father during the state of pupillage, during which time policy requires that the child should be under the protection of his father, he must be considered as incorporated with his father's family, unless he has gained a distinct settlement of his own, or has become the head of a family himself: but if the child, after a state of pupillage, sever himself from the father's family, he cannot afterwards be incorporated with it. The case of the soldier proceeded upon that principle; he had neither gained a settlement nor was in a situation to gain one; but he had ceased to be under the control of his parents, and had become liable to the control of others: and as he did not return to his father until after he was of age, the case was thought too clear to be argued. But it must not be inferred from the circumstance of that case not having been argued that it passed without consideration, and is not entitled to much notice; because in a subsequent case† Mr. J. ASTON, who was a very good sessions lawyer, alluded to it as a case properly decided. And if that case were properly decided, it must govern the present, for I cannot distinguish between them. Some stress however has been laid in the argument to-day on the circumstance of that person having engaged in the situation of a soldier: but that cannot be material in any other way than as shewing that the son was no longer under the control of his father. So in this case this woman was above the age of twenty-one; she had contracted the relation of servant with another family; she was out of *her father's family; she was [*253] under no other control to him than that arising from moral obligation and gratitude; and I cannot see how she could after-

† *R.* v. *Halifax*, Burr. S. C. 807.

1795.
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wards be deemed to be incorporated with the father's family. The rule to be extracted from the cases is this; if the child be separated from the parents, and without marrying or obtaining any settlement for himself return to them again during the age of pupillage, he is to all intents a part of his father's family, and his settlement will vary with that of his father: but if, when that time arrives when in estimation of law the child wants no further protection from the father, the child removes from the father's family, he is not for the purpose of a derivative settlement to be deemed part of that family: this rule will reconcile all the cases, and will be found to be an intelligible one.

[ASHHURST, J. GROSE, J. and LAWRENCE, J. delivered judgments to a similar effect.]

Order of Sessions confirmed.

1795.
May 6.
[268]

THE KING *v.* MILLER.

(6 T. R. 268—281.)

The constitution of a corporation as settled by Act of Parliament cannot be varied by the acceptance of any charter inconsistent with it. Where an integral part of a corporation composed of a definite number is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend. But a majority of those present, when legally assembled, will bind the rest.

AN information in nature of a *quo warranto* was filed against the defendant for exercising the office of mayor of the town of Northampton. [The pleadings in the action raised the question of the validity of the election; and this involved, practically, the existence of the corporation. The arguments extend to a considerable length, as generally happened in cases of this class, before the Reform Act which destroyed their political importance. The judgment of Lord KENYON is here retained from its importance in regard to the general principles of the common law relating to corporations.]

LORD KENYON, Ch. J.:

When it is stated that the usage in this corporation for the last three centuries has been conformable to the mode of election on which the defendant's title is founded, it is desirable that the election should be supported: but we must take care in indulging our wishes, not to transgress the limits of the law. If we were inclined to speculate upon the views and objects of the legislature, *when they passed this Act of Parliament, we could not do better than adopt what has been suggested by the counsel for the Crown; having contemplated the form of the government of the country, and (though it was not then so completely modelled as it is at present) having observed that it went a great way to attain the ends of a just government, the legislature wished to imitate that form in the constitution of this corporation; that there should be a kind of supreme magistrate, to be assisted in the exercise of his functions by those of the superior orders in the town, and by a certain number of other persons chosen from the inferior classes of the inhabitants at large, who could best know and take care of the wants and rights of the whole, in order that after discussing and deliberating upon the rights of all, the result of this meeting, thus composed, might be favourable to the rights of the town. And therefore this Act of Parliament directed that the mayor and his brethren, those who had been in a superior station in the corporation, and a definite number of persons, forty-eight, who were not of the superior classes of the town, should constitute a legal assembly for the election of the future mayors. If it were necessary for us to decide on the meaning of the word "brethren" in this part of the statute, I should feel inclined to subscribe to the construction put upon it by the defendant's counsel, and say that it meant "bailiffs:" it is not necessary however to decide that point. In the determination of this case we must not forget that this corporation differs from many of those that have given rise to questions of this kind; the constitution of the assembly for the election of a mayor was created by an Act of Parliament, and it could not afterwards be altered by the king's charter. Where a corporation takes its rise from the king's charter, the king by granting and the corporation by accepting another charter may alter it, because it is done with

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the consent of all the parties who are competent to consent to the alteration. But no such alterations could be made in this case by the king's charter alone, because the mode of election was introduced by Act of Parliament. Then let us consider what the Act of Parliament requires to be done; it directs that "the mayor and his brethren for the time being that then of times past had been mayors, or the more part of them, should name and choose 48 persons of the most wise, discreet, and best disposed persons of the inhabitants, other than before that time had been mayors and bailiffs, which said persons so by them [*278] chosen *and named, and the said mayor and his brethren, and such persons as then should have been mayors and bailiffs or the more part of them, should have and make yearly election of mayors and bailiffs, &c." Then as the election is to be made by the assembly thus constituted, it is necessary that a major part of that assembly should concur in the election. The distinction between those cases where a corporate act is to be done by a definite number, and those where by an indefinite body, has been established in a variety of cases. Without going through them all I refer generally to that of *R.* v. *Bellringer;* not because I pay a greater deference to the judgments given in this Court since I have been here, but because it is the latest decision, and was founded on principles established in the time of our predecessors. That case does not introduce any new law upon the subject, but is a deduction from all former authorities and settled principles. And this proposition seems to be now clearly established, that where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when any act is to be done by them, but a majority of that body must attend the assembly where such act is done. Now in this case the definite body of 48 did not exist in its majority when the defendant's election took place, it having been then reduced to the number of 19. I am therefore bound to say, unless we abandon the case of *R.* v. *Bellringer,*† and the cases on which it was determined, that the defendant's election cannot be supported, and that there is an end of this corporation. One of the integral parts of the corporation failing, the whole failed. The

† 4 T. R. 810.

framers of this corporation could never have intended that it should be in the power of the corporation to reduce one of its integral members, because that would be altering the governing power meant to be constituted. As well therefore on the words of this Act of Parliament as on the reason of the thing, and conformably with all the authorities referred to, I am of opinion that this corporation had received its death-wound before the defendant's election took place, and consequently that this election cannot be supported.

[ASHHURST, J. GROSE, J. and LAWRENCE, J. concurred.]

Per CURIAM: *Judgment for the Crown.*

SHIPWICK *v.* BLANCHARD.

(6 T. R. 298—300.)

1795.
May 15.
[298]

If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer.

AN action of trover for certain goods was brought in order to try the bankruptcy of one Grunden, who was the landlord of the plaintiff for the house she inhabited. The defendant was his assignee under the commission. HEATH, J. before whom this was tried at the last Assizes at York, reported that on the 8th November, 1794, one Whitley by order of the defendant as assignee entered the plaintiff's house, and seized and distrained her goods for rent in arrear to the bankrupt. He declared this to the plaintiff at the time of the seizure, and gave her a written notice to that effect. The plaintiff to redeem her goods paid him 5*l.* for rent and 40*s.* for the expenses. It appeared further that the debt of the petitioning creditor accrued and became due after the *reputed acts of bankruptcy of Grunden. It was objected by [*299] the counsel for the defendant at the trial that this did not amount to a conversion: but the learned judge being of opinion that it was equivalent to a sale to a stranger, which had been deemed to be a conversion, and that trover was the proper action for trying questions of bankruptcy, over-ruled the objection, and the plaintiff obtained a verdict.

1795.

SHIPWICK v. BLANCHARD.

Chambre on a former day obtained a rule to shew cause why the verdict should not be set aside, on the ground that no actual conversion was proved; that it was not in evidence that the defendant had laid his hands on any of the goods in question, but had merely given a notice in writing to the plaintiff that he seized such and such goods, enumerating them, as a distress for rent in arrear. Secondly, that there was no conversion in point of law.

Law shewed cause:

The fact of obliging the plaintiff to advance money in order to redeem her goods from a wrongful distress amounts in law to a sale, which is a conversion. It is immaterial whether the goods were purchased by a stranger or bought in again by the owner. But even if that were otherwise, yet the extorting of 40*s*. by virtue of having possessed himself tortiously of the goods under a pretended legal right is of itself a conversion. There is no occasion for a party to take possession of goods by laying his hands upon them; if he claim and assert a dominion over them, especially by turning the possession of them to his own profit, that is a clear possession in law to subject the wrong-doer to an action of trover.

Chambre and *Holroyd* in support of the rule:

In order to maintain trover, the goods must be taken or detained with intent to convert them to the taker's own use, or the use of those for whom he is acting. Now here the goods were not taken at all, or if they were, they were taken under a special authority, and certainly not for the use of the party. There must be a taking in fact and an exclusive possession in order to maintain trover, though there need not be a manual taking of the whole property. Taking the key of the warehouse, in which goods are deposited, or taking a part of the goods in the name of the whole, is sufficient, 6 Mod. 215. But here there was no taking in fact, but only a notice to the plaintiff that the things were taken without any removal of them or actual laying of hands on any part of them. There was no act amounting to a trespass, without which in this case trover could not be main-

tained. But at *any rate the goods were not taken for the use of the party, but as a distress for rent; he did not claim the disposition of them at the time; they were in *custodiâ legis*. If the distress were wrongful, the party might have replevied; or if the money were wrongfully paid, it might be recovered back again in another form of action: but this was no sale of the goods, or in the nature of one. It was a payment, not for the goods, but for the rent, *eo nomine*, and the costs of the distress. The plaintiff acquiesced in the distress at the time, and the payment was made voluntarily in order to get rid of the distress, and not as a price for the goods.

The COURT took time to consider of this case: and now their opinion was delivered by

LORD KENYON, Ch. J.:

This case stood over on account of some doubts in my mind whether an action of trover could be supported under these circumstances: I have looked into the cases, and I have removed those doubts; though I must observe that similar doubts have been before entertained in cases of this kind. In Bunbury 67 it was objected by the Attorney-General that trover would not lie against a custom-house officer for seizing goods not liable to seizure, because it could not be said that the officer converted them to his own use; and the Chief Baron BURY inclining to be of that opinion, the plaintiff chose to be nonsuited. The same case (as I suppose) is to be found in page 80 of the same book, though the form of the action appears to have been changed, and there the opinion of the Court seems to have accorded with that of the Chief Baron. However both those cases were fully considered in *Tinkler* v. *Poole*,† when this Court were of opinion that trover would lie against a custom-house officer for seizing the plaintiff's goods, as it turned out that the seizure was not founded in law, though Lord MANSFIELD, who tried the cause, had paused at *nisi prius* on account of the cases cited from Bunbury. So here inasmuch as it appears that the distress made by the defendant under the assignee of the bankrupt was illegally made, because he was not the legal assignee, the

† 5 Burr. 2657.

1795.
SHIPWICK v. BLANCHARD.

petitioning creditor's debt not having accrued until after the act of bankruptcy, this action of trover may be maintained against the defendant who illegally made the distress. My doubts are removed by the case in Burrow.

Rule discharged.

1795.
May 16.
[303]

WILDE *v.* CLARKSON.

(6 T. R. 303—304.)

The Court will order satisfaction to be entered on the record in an action on a bond of indemnity on the defendant's paying the penalty of the bond and the costs of the action.

THE plaintiff having brought an action on a bond, given by the defendant and others the parish officers of Ashby de la Zouch to indemnify the parish of Ripley against any expense that they might be put to by reason of the then expected birth of a bastard child of J. Shaw (a parishioner of Ashby de la Zouch, but then resident in Ripley) in the parish of Ripley.

Vaughan obtained a rule calling on the plaintiff to shew cause why on payment of 40*l.* the penalty of the bond, together with the costs, satisfaction should not be entered on the record.

Balguy now shewed cause against that rule: and relied on the case of *Lord Lonsdale* v. *Church*† to shew *that in an action on a bond damages may be recovered beyond the amount of the penalty.

[*304]

LORD KENYON, Ch. J.:

I cannot accede to the doctrine in the case cited by the plaintiff's counsel; according to that an obligor who became bound in a penalty of 1,000*l.* conditioned to indemnify the obligee may be called upon to pay 10,000*l.*, or any larger sum, however enormous. Suppose the plaintiff proceeds in this action and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s.* nominal damages for the detention of the debt. But here the defendant is willing to pay the whole

† 1 R. R. 501.

penalty, and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds or on any penal sums for performance of covenants, &c. the Act of Parliament* expressly says that there shall be judgment for the penalty; and that the judgment shall stand as a security for further breaches: but the obligor is not answerable in the whole beyond the amount of the penalty.

Per CURIAM: *Rule absolute.*

Note.—These conflicting cases at law are discussed in *Clarke* v. *Seton*, 6 Ves. 411. So far as the question is only whether damages beyond the penalty can be recovered in an action *on the bond*, the cases are now unimportant. But on the substantial question whether a penal bond can be construed as implying an agreement to perform the condition, the tendency is now to adopt the principles of the judgment of Mr. Justice Buller, rather than the more literal interpretation of Lord Kenyon. See *National Provincial Bank of England* v. *Marshall*, C. A. (1888) 40 Ch. D. 112; 58 L. J. Ch. 229.—R. C.

K. B. TRINITY TERM.

JOHN DAINTRY *v.* MICHAEL DAINTRY AND JOHN RYLL.

1795.

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(6 T. R. 307—314.)

A., after giving different annuities to an only son increasing at different ages till thirty, and to be paid to him until he married, devised thus:—"In case my son shall happen to marry before he attains the age of thirty, then I give and devise to him and the heirs of his body all my real and personal estates, &c., and if my son should happen to die without leaving issue of his body, then I give and devise the same to my brother B." Held that the son took an estate tail in the real estates, and the personal estate absolutely.

THE following case was sent here by the Master of the Rolls for the opinion of this Court.

John Daintry the testator by his will dated 15th of August,

* 8 & 9 W. III. c. 11, s. 8.

1795.

DAINTRY v. DAINTRY.

1785, after devising a house, &c. in Leek, to his brother M. Daintry in fee, devised as follows; "Also it is my will and mind and I do hereby order and direct the said M. Daintry and J. Ryll and the survivor of them to pay unto my son John Daintry and his assigns one annuity or yearly sum of 400*l.* free from all taxes whatsoever &c. the said *annuity of 400*l.* to be paid to my said son John Daintry until he shall attain his age of 26 years; and upon my son John Daintry's attaining his said age of 26 years, then I do hereby order and direct the said Michael Daintry and John Ryll, and the survivor of them, to pay unto my said son John Daintry the further additional annuity or yearly sum of 100*l.* &c.; the said annuity of 100*l.* to be paid to my said son John Daintry until he shall attain his age of 30 years; and upon my said son John Daintry's attaining his said age of 30 years, then I do hereby order and direct the said Michael Daintry and John Ryll and the survivor of them to pay unto my said son the further additional annuity or yearly sum of 100*l.* &c.; the said several sums making together the yearly annuity of 600*l.*, the same to continue to be paid to my said son during such time and until he shall marry; and in case my said son shall happen to marry before he attains unto the age of 30 years, then my will and mind is and I do hereby give and devise unto my said son John Daintry to him and the heirs of his body lawfully to be begotten all my real and personal estates whatsoever and wheresoever (except the said estate devised unto my brother), subject to the payment of the several sums of money hereinafter mentioned in this my will; and if my said son John Daintry shall happen to die without leaving issue of his body lawfully to be begotten, then I give, devise and bequeath all my real estates, subject as aforesaid, unto my said brother M. Daintry, his heirs and assigns for ever; and all my personal estate in general, (subject as hereafter is mentioned) unto my said brother M. Daintry, his executors, administrators and assigns to and for his and their own use." He appointed M. Daintry and J. Ryll his executors, and gave them 100*l.* each, to be paid out of his personal estate, which he also charged with the payment of some small legacies and his debts amounting in the whole to 540*l.* J. Daintry the testator died on the 18th of August, 1785, without

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altering his will, leaving the plaintiff his only child and heir-at-law and also his sole next of kin; and soon after his death the defendants duly proved his will, &c. and possessed themselves of all his personal estate, and likewise entered upon and took possession of all his real estate, and have been ever since and are now in the possession and receipt of the rents and profits thereof. The plaintiff John Daintry has attained his age of 30 years, and is now and ever has been *unmarried. The testator's freehold [*309] estate is very inconsiderable, but his personal property amounts to about 30,000*l.*

The questions directed to be made were; first, What estate and interest the plaintiff John Daintry the only child and heir of the testator John Daintry took under the testator's will dated 5th day of August, 1785, in his real estate, other than in such part thereof as was thereby devised to the testator's brother M. Daintry; and also what estate and interest the plaintiff took under the testator's will in such part of the personal estate of the testator as consisted of leases for years in land. * * *

[After argument.]

LORD KENYON, Ch. J.:

* * The plaintiff in this case is the heir-at-law, the only [313] child, and the sole next of kin, of the devisor, who, having a small landed estate and a considerable personalty, proceeded to dispose of them both; he began his will by giving different annuities to his son, varying according to the different periods of his life, and increasing till it amounted to 600*l.* per annum, directing that the last annuity should be paid to the son "until he should marry;" and then he added "and in case my said son shall happen to marry before he attains unto the age of 30 years, then my will is, and I do hereby give and devise unto my son J. Daintry, to him and the heirs of his body, &c. all my real and personal estates, &c. According to the defendant's argument, if the son had lived to 30 without marrying, and then married, and had children, there would be no provision for those who ought to have been the first objects of the devisor. And such is the case if we determine according to the express devises of the will: but I am glad to find that, though there is no

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DAINTRY v. DAINTRY.
[*314]

express devise to the son in the event of his marrying after 30, there are words in the will sufficient to raise a devise in favour of the son, of an estate *tail; for in the next clause the words are "if my said son J. Daintry shall happen to die without leaving issue of his body, then over, &c." Now those words are sufficient to raise an estate tail by implication; and though they are subsequent in point of order to the words expressly giving an estate to the son, in the construction of wills the last words are to take effect. If that be so, the son is entitled to an estate tail in the real estate, but the devise over of the personalty seems to be a good executory devise, because it is not too remote. This is precisely like the case of *Forth* v. *Chapman*,† where Lord MACCLESFIELD relied on the word "leaving," saying that when used in the limitation of personal property it is confined to "leaving issue at the time of the death." Therefore as to the real estate I think that J. Daintry takes an estate tail: as to the personalty, he takes for life, and if he has children he takes it absolutely; if he leave no children, then it will go over to the uncle by way of an executory devise.

But afterwards the following certificate, which Lord KENYON read in Court, was sent to the Master of the Rolls; his Lordship observing that the questions arose on a very perplexed will, and that this determination (they thought) would best effectuate the devisor's intention:

"The questions arising on this obscure will have been argued before us, and we have considered them. We are of opinion that the intention of the testator, to be collected from the words of his will, will be best answered by giving an estate tail to John Daintry in the real estates of inheritance, with remainder to M. Daintry in fee; and as to the leasehold interest, it seems to follow of course, from what we have said about the estates of inheritance, that the absolute interest is vested in John.

"KENYON.
"W. H. ASHHURST.
"N. GROSE.
"S. LAWRENCE."

† 1 P. Wms. 663.

STONEHOUSE *v.* ELLIOTT.

1795.

(6 T. R. 315—317.)

[315]

If A. having been robbed suspect B. to be guilty, and take him and deliver him into the charge of a constable present, B. (if innocent) may maintain trespass against A.

THIS action of trespass, assault, and false imprisonment was tried before Lord KENYON at the sittings at Westminster after last Hilary Term, when these facts were given in evidence. The defendant, whose pocket had been picked at the play-house, suspected the plaintiff, and having laid hold of him, gave him in charge to a constable who was present, and to whom she had before communicated her suspicions. The plaintiff was taken to the office in Bow Street, where the defendant still persisted in her charge against the plaintiff, but after some examination it appeared that the defendant was mistaken in her suspicions of the plaintiff, and he was released. It was objected that the plaintiff had misconceived his action, that he should have brought an action on the case for making the malicious charge, and that trespass would not lie in such a case as the present. The cause however proceeded, and the plaintiff obtained a verdict subject to the opinion of this Court, whether the action in its present form could be maintained. Accordingly

Gibbs moved in the last Term to set aside the verdict, and to enter a nonsuit; and he was now called upon to support his motion. On general principles of law, and on the ancient mode of pleading, this should have been an action on the case, and not trespass, though it must be admitted that there have been several determinations at *nisi prius* that an action of trespass may be maintained under circumstances similiar to the present. The general principle is that if one person accuse another of a crime, and take legal steps to bring the accused to trial, he is not liable to an action unless he act wilfully wrong. It was admitted at the trial, and cannot now be denied, that if the defendant, instead of giving the plaintiff in charge to a constable, had obtained a warrant from a justice of the peace, and had thus procured the defendant's arrest, this would not have been the proper form of action, but the plaintiff must have brought an action on the

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case, which could only have been supported by evidence of the defendant's having acted maliciously. Now in principle there is no distinction between that case and the present. Here the defendant, instead of applying to a magistrate for a warrant, adopted another mode of proceeding equally allowed by the law; [* 316] *a constable being present, she delivered the plaintiff over into his custody. Both these modes of proceeding in order to bring the supposed offender to justice are sanctioned by the law; the only difference being that if a constable be present when any felony or breach of the peace is committed, the arrest may be made without a warrant; if no constable be on the spot, a warrant from a magistrate is necessary to legalise the arrest. This principle is also illustrated by the old form of pleading in cases of this kind; for if there were any distinction in the form of the action between those cases where the party accused was arrested by virtue of a warrant and those where no warrant was previously obtained, and if an action on the case could only be maintained in the former instance it should be stated in the declaration that a warrant was issued under which the plaintiff was arrested; for every declaration should contain that without which the action cannot be sustained in the given form: but no such averment is to be found in any of the old entries. In Robins. Entr. 339, there is the form of such an action on the case, in which it is merely alleged that the defendant maliciously procured the plaintiff to be arrested, carried before a magistrate, and sent to prison, &c. without taking notice of a warrant for the arrest; from which it is to be inferred that there was no warrant there, and that an action for a malicious prosecution is the proper form under circumstances like the present.

Erskine, against the rule, said that there were several *nisi prius* cases in support of the present form of action; and that it was warranted by what fell from Mr. J. ASHHURST in *Morgan* v. *Hughes*.† "The general distinction is this; where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only: but where the act of imprisonment by one person is in consequence of information

† 2 T. R. 231.

from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." He was then stopped by the Court.

LORD KENYON, Ch. J.:

The doubt whether this was the proper form of action originated with me. I thought at the trial that as the constable's power to arrest *flagrante delicto*, for the purpose of putting the supposed offender into a course of justice, was allowed by the law, the person making the charge could only be liable in an action on the case for *making such a charge maliciously. But I am now satisfied [*317] that trespass will lie in this case, this having been the constant course of proceeding.

GROSE, J. referred to the case of *Samuel* v. *Payne*, Dougl. 358.

Per CURIAM:

Rule discharged.†

CUTTER, ADMINISTRATRIX OF CUTTER, *v.* POWELL.

(6 T. R. 320—327.)

1795. *June* 9.

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If a sailor hired for a voyage take a promissory note from his employer for a certain sum provided he proceed, continue and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*.

To *assumpsit* for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for 31*l.* 10*s.* subject to the opinion of this Court on the following case.

The defendant being at Jamaica subscribed and delivered to T. Cutter the intestate a note, whereof the following is a copy; "Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship *Governor Parry* sailed from Kingston on the 2nd of August, 1793, and arrived in the

† *Vide* 8 Hale 78, &c., and 2 Hawk. c. 12, s. 18.

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port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2nd day of August, and proceeded, continued and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home is four pounds per month: but when seamen are shipped by the run from Jamaica to England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last Term by *J. Haywood* for the plaintiff: but the Court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage one way or the other: but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

Chambre for the plaintiff, and *Wood* for the defendant.

Arguments for the Plaintiff:

The plaintiff is entitled to recover a proportionable part of the wages on a *quantum meruit* for work and labour done by the [*321] intestate during that part of the *voyage that he lived and served the defendant; as in the ordinary case of a contract of hiring for a year, if the servant die during the year, his representatives are entitled to a proportionable part of his wages. If any defence can be set up against the present claim, it must arise either from some known general rule of law respecting marine service, or from the particular terms of the contract between these parties. But there is no such rule applicable to marine service in general as will prevent the plaintiff's recovering, neither will it be found, on consideration, that there is any thing in the terms of this contract to defeat the present claim. It is indeed a general rule that freight is the mother of wages; and

therefore if the voyage be not performed, and the owners receive no freight, the sailors lose their wages; though that has some exceptions where the voyage is lost by the fault of the owners, as if the ship be seized for a debt of the owners, or on account of having contraband goods on board; in either of which cases the sailors are entitled to their wages though the voyage be not performed. Vin. Abr. "Mariners," 235. But here the rule itself does not apply, the voyage having been performed, and the owners having earned their freight. There is also another general rule, that if a sailor desert, he shall lose his wages: but that is founded upon public policy, and was introduced as a mean of preserving the ship. But that rule cannot apply to this case; for there the sailor forfeits his wages by his own wrongful act, whereas here the seaman was prevented completing his contract by the act of God. So if a mariner be impressed, he does not forfeit his wages; for in *Wiggins* v. *Ingleton*,† Lord HOLT held that a seaman, who was impressed before the ship returned to the port of delivery, might recover wages *pro tanto*. Neither is there any thing in the terms of this contract to prevent the plaintiff's recovering on a *quantum meruit*. The note is a security, and not an agreement; it is in the form a promissory note, and was given by the master of the ship to the intestate to secure the payment of a gross sum of money, on condition that the intestate should be able to, and should actually, perform a given duty. The condition was inserted to prevent the desertion of the intestate, and to ensure his good conduct during the voyage. And in cases of this kind, the contract is to be construed liberally. In *Edwards* v. *Child*,‡ where the mariners had given bonds to the East India *Company not to demand their [*322] wages unless the ship returned to the port of London, it was held that as the ship had sailed to India and had there delivered her outward bound cargo, the mariners were entitled to their wages on the outward bound voyage, though the ship was taken on her return to England. This note cannot be construed literally, for then the intestate would not have been entitled to anything though he had lived and continued on board during the whole voyage, if he had been disabled by sickness from performing his

† 2 Lord Raym. 1211. ‡ 2 Vern. 727.

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duty. But even if this is to be considered as a contract between the parties, and the words of it are to be construed strictly, still the plaintiff is entitled to recover on a *quantum meruit*, because that contract does not apply to this case. The note was given for a specific sum to be paid in a given event; but that event has not happened, and the action is not brought on the note. The parties provided for one particular case: but there was no express contract for the case that has happened; and therefore the plaintiff may resort to an undertaking which the law implies, on a *quantum meruit* for work and labour done by the intestate. For though, as the condition in the note, which may be taken to be a condition precedent, was not complied with, the plaintiff cannot recover the sum which was to have been paid if the condition had been performed by the intestate, there is no reason why the representative of the seaman, who performed certain services for the defendant, should not recover something for the work and labour of the intestate in a case to which the express contract does not apply.

Arguments on behalf of the Defendant:

Nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was that the law implies what they would have agreed to do had they entered into a precise treaty: but when once they have expressed what their agreement was, the law will not imply any agreement at all. In this case the intestate and the defendant reduced their agreement into writing, by the terms of which they must now be bound. This is an entire and indivisible contract; the defendant engaged to pay a certain sum of money, provided the intestate continued to perform his duty during the whole voyage; that proviso is a condition precedent to the intestate or his representative claiming the money from the defendant, and that condition not having [*323] been performed, the plaintiff cannot *now recover any thing. If the parties had entered into no agreement and the intestate had chosen to trust to the wages that he would have earned and might have recovered on a *quantum meruit*, he would only have

been entitled to 8*l.*; instead of which he expressly stipulated that he should receive thirty guineas if he continued to perform his duty for the whole voyage. He preferred taking the chance of earning a large sum in the event of his continuing on board during the whole voyage to receiving a certain, but smaller, rate of wages for the time he should actually serve on board; and having made that election, his representative must be bound by it. In the common case of service, if a servant who is hired for a year die in the middle of it, his executor may recover part of his wages in proportion to the time of service:* but if the servant agreed to receive a larger sum than the ordinary rate of wages on the express condition of his serving the whole year, his executor would not be entitled to any part of such wages in the event of the servant dying before the expiration of the year. The title to marine wages by no means depends on the owners being entitled to freight; for if the sailors desert, or do not perform their duty, they are not entitled to wages though the owners earn the freight. Nor is it conclusive against the defendant that the intestate was prevented fulfilling his contract by the act of God; for the same reason would apply to the loss of a ship, which may equally happen by the act of God, and without any default in the sailors; and yet in that case the sailors lose their wages. But there are other cases that bear equally hard upon contracting parties; and in which an innocent person must suffer if the terms of his contract require it; *e. g.* the tenant of a house who covenants to pay rent and who is bound to continue paying the rent, though the house be burned down.†

LORD KENYON, Ch. J.:

But that must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, Lord C. NORTHINGTON said that if the tenant would give up his lease, he should not be bound to pay the rent.‡

* The old law was otherwise; *vid.* Bro. Abr. "Apportionment," pl. 13, ib. "Labourers," pl. 48, ib. "Contract," pl. 31, and *Worth* v. *Viner*, 3 Vin. Abr. 8 and 9.

† *Vide Belfour* v. *Weston*, 1 R. R. 210.

‡ *Vide Brown* v. *Quilter*, Ambl. 619.

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[*324]

With regard to the case cited from 2 Lord Raym.; the case of a mariner impressed is an excepted *case, and the reason of that decision was founded on principles of public policy.

LORD KENYON, Ch. J.:

I should be extremely sorry that in the decision of this case we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form any thing like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that if we were assured that these notes are in

universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHHURST, J.:

We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract *itself. This is a written [*325] contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued however that the plaintiff may now recover on a *quantum meruit*: but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

GROSE, J.:

In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much relied upon. I have looked into the laws of Oleron; and I have seen a late case on this subject in the Court of Common Pleas, *Chandler* v. *Greaves*.† I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The

† Hil. 32 Geo. III. C. B.

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laws of Oleron are extremely favourable to the seamen: so much so that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages after deducting what has been laid out for him. In the case of *Chandler* v. *Greaves*, where the jury gave a verdict for the whole wages to the plaintiff who was put on shore on account of a broken leg, the Court refused to grant a new trial, though I do not know the precise grounds on which the Court proceeded. However in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty [*326] guineas or to nothing, for such was *the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything. I believe, however, that in point of fact these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

LAWRENCE, J.:

If we are to determine this case according to the terms of the instrument alone the plaintiff is not entitled to recover, because it is an entire contract. In Salk. 65, there is a strong case to that effect; there debt was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for his service; the plaintiff shewed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded 75*l.* for three quarters; after judgment

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for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt it could not be divided; and this Court were of that opinion: and reversed the judgment. With regard to the common case of a hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover any thing. As to the case of the impressed man, perhaps it is an excepted *case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owner of the ship. [*327]

Postea to the defendant,

Unless some other information relative to the usage in cases of this kind should be laid before the Court before the end of this term: but the case was not mentioned again.†

THE KING *v.* JOHN CATT.

(6 T. R. 332—335.)

1795. *June* 10.

[332]

A master of a free school appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family freely without payment of any rent, income, gift, sum of money or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants is rateable to the poor for his occupation of the same.

THE defendant appealed to the Suffolk sessions against a poor-rate for Woodbridge parish on several grounds, one of

† See the notes to this case in Smith's Leading Cases, vol. ii.; and *Appleby* v. *Myers* (1867) L. R. 2 C. P. 651, 660, 36 L. J. C. P. 331.—R. C.

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which was the omission of the Rev. R. Dyer, the occupier of a house and garden in the same parish. The sessions confirmed the rate subject to the opinion of this Court on the following case. The Rev. R. Dyer, omitted in the rate, was occupier of a house and garden of the value 10*l.* a year and upwards, which he held as master of a free school in the said parish by appointment of the minister and inhabitants of the parish, under and by virtue of a certain deed of indenture, bearing date the 2nd of September, 1662, and made between the parties therein named; in which the said messuage, yards, garden, orchard, and all appurtenances thereunto belonging situate in the parish, were assigned for the habitation of the master and for the use of him and his family, freely without payment of any rent, income, gift, sum of money, or other allowance whatsoever for or out of the same, together with two acres and a half of pasture land called Willard's charity land lying in the said parish; and also the following yearly rent charges, viz. (three rent charges on lands in different parishes amounting to 25*l.* a year,) for the teaching of ten boys, sons of the meaner sort of the inhabitants of the parish of Woodbridge. R. Dyer became master of the school in the year 1775. No rates have been paid for the house and garden, as appears by the poor rates of the parish of Woodbridge, which have been examined as far back as the year 1748. R. Dyer lets the two acres and a half of charity land in the parish of Woodbridge called Willard's charity land, for which the several occupiers are rated in the said rate.

Mingay and *Alderson* in support of the order of sessions:

The master of the free school is not liable to be rated in this case, upon the principle of the case of *R.* v. *Waldo.** There the defendant had appropriated a house to the charitable purpose of educating and maintaining ten poor girls, and had placed a woman therein for the purpose of superintending and instructing them. It was held that the owner himself was not rateable [333] in respect of the house. * * As to what is said in the case of *St. Luke's Hospital,*† that any officer of a public charity occupying any part of the building beneficially would be liable to

* Cald. 358. † 2 Burr. 1053.

be rated; that only relates to public charities and not to a parochial charity like the present, where the parish are bound by their own agreement to give the master this house free from any onus. In *R.* v. *Scott*,† an exemption in a private statute in 12 Car. II., of lands and houses given for the same charitable purpose of supporting a free school "from all public taxes, charges and assessments whatsoever, civil or military," was held to extend to the poor's rate. * * *

Erskine, contrà, was stopped by the Court.

LORD KENYON, Ch. J.:

To the authority of the cases cited I subscribe my assent. They proceeded on the ground that there was no occupier. In *R.* v. *Waldo* the rate was held to be bad because there was no occupier; the poor children who were placed there for education could not be considered as occupiers, neither could the woman servant who superintended them. That case could not be distinguished from that of *St. Luke's Hospital*, where the rate was also quashed because there was no beneficial occupier. But when a case arises where a person is found to be the beneficial occupier *of a house, he must be rated, though the house be [*334] appropriated to charitable purposes. As long as Richmond Park continued in the hands of the King, it was not rateable: but when the Ranger made profits of it, and beneficially occupied it, it was held to be rateable in his hands.‡ So if this person had been put in merely to look after the pupils and had not occupied the house, he would not have been rateable; but it appears that he is the beneficial occupier of this house and garden. By the old land-tax Act certain property given for charitable purposes is exempted from that tax; but there is no such exemption in the Acts respecting the relief of the poor. If the argument against the present rate were to prevail, I do not know how far it might be extended. Those lands that are appropriated for the establishment of the religion of the country are in one sense of the word lands given for charitable purposes: but parsonage houses, glebe lands, &c. are rateable in the hands of the occupiers. It is

† 3 T. R. 602. ‡ 1 R. R. 220.

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properly admitted that there cannot be a prescription against the poor rates. If every individual in the parish had agreed not to take advantage of the omission of this person in the rate, perhaps no one could afterwards have objected to it: but that is not the case here. The persons who made this rate seem to have acted honourably as far as respected themselves: but if there be any individual in the parish who objects to the omission of the defendant, the objection must prevail. This is not like the case of *R.* v. *Scott*, where it was held that the master of the school was exempted under an Act of Parliament, by which the Legislature had a right to bind every person; for this defendant was appointed by deed, and only those who are parties to a deed are bound by it.

ASHHURST, J. of the same opinion.

GROSE, J.:

In *R.* v. *The occupiers of St. Luke's Hospital*, which was one of the first cases on this subject, the ground on which the Court proceeded was, not that the house was given to charitable uses, but that there was no person who could be said to be the occupier of it. The rate there was not considered as improper because the property was not in itself rateable, but because no occupier could be found. But in this case there is an occupier. That part of the land, given for the same purposes in this case, which is let out, is rated in the hands of the several occupiers; no [*335] objection is *made to that part of the rate: and I cannot distinguish between the house and garden occupied by this defendant and the land so let to those occupiers. The defendant is a beneficial occupier of the property for which he is rated; then here is that person an occupier, who could not be found in the case of *R.* v. *St. Luke's Hospital.*

LAWRENCE, J.:

In order to make this like the case of *R.* v. *Waldo*, the rate should have been on the founder of the school.

Order of sessions quashed.

THOMAS LANE *v.* EARL STANHOPE AND OTHERS.

1795. *June* 12.

(6 T. R. 345—355.)

[345]

The word "farm" in a will is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass. A. being seised of several freehold estates, and possessed of part of a farm held by a church lease renewable (the other part of the farm being freehold, and the whole having been always let together as one entire farm, at one rent), devised "all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estates whatsoever," to B.; and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to C.; held that the leasehold part of the farm passed under the first devise.*

[THE following case was sent by the Court of Chancery for the opinion of the King's Bench. The questions raised sufficiently appear from the judgment of Lord KENYON. After argument:]

LORD KENYON, Ch. J.: [352]

We will certify in this case; but I will now say a few words to shew the foundation of my opinion. It is our duty in construing a will to give effect to the devisor's intention as far as we can consistently with the rules of law; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be as Lord KING and other Judges have said removing land-marks: but if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases which tend only to involve the question in obscurity. On the whole of this will, taking it together, I have no doubt. The devisor had two kinds of property, real and personal property. It appears by the case that a part of the farm held by lease under the Archbishop of Canterbury had been for a long course of years in the testator's family, and was considered almost equivalent to a perpetuity on account of the covenant to renew, and that as far as can be traced it had been let by the testator and his family,

* Compare *Holmes* v. *Milward* (1878) 47 L. J. Ch. 522; judgment of FRY, J. 525.—R. C.

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together with the rest of the farm which is an estate of inheritance, and which belonged to them, as one entire farm, to the same tenant under one integral rent. Every one must be aware of the inconvenience of splitting this farm now, on account of the apportionment of rent and the power of distress: and perhaps it would be difficult for either party to occupy it beneficially. The testator, having this various property, sat down to make his will; and he devised "all his manors, messuages, or tenements, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever and wheresoever unto R. Bentinson, &c." In many cases that might be put I should not lay much stress on the word farm; whether it should have much or little weight must depend upon the subject. Then after giving some pecuniary legacies, the testator added a residuary clause, by which he gave "all the rest and residue of his ready money, rents in arrear, stock in any of the public funds, jewels, and personal estate whatsoever, unto R. Bentinson, &c." Now if this will were to be read by any person, not fettered with legal and technical notions, he would not hesitate about the intention, but would say that all the landed property, without considering the particular circumstances of that landed property, was disposed of by the first [*353] clause, *and all the personal property by the last. It is material to observe that the first words in the residuary clause apply to money, after which it is not to be supposed that the testator intended to recur to land, he having in the former part of the will used words sufficiently comprehensive to include every species of landed property. I admit that several of the limitations, which are applied to the real estate, are inapplicable to the species of property now in dispute: but I think it would be too much to say that that observation alone should preclude the idea that the testator intended to pass the leasehold part of the farm under the words used in the first clause, as we all know how frequently many of the limitations are used in a will inapplicable to every part of the property disposed of by it. I do not wonder that this Court determined the case of *Pistol* v. *Riccardson* † with reluctance, as is mentioned by the note in 2 P. W.; for it appears that that case came before the Court at several different

† 2 P. Wms. 452, n.

times, I only lament that the case of *Addis* v. *Clement*,* was not then cited; for Lord MANSFIELD seemed to feel himself pressed by a torrent of authorities to decide contrary to his better judgment, and I cannot forbear thinking that if *Addis* v. *Clement* had then been mentioned, the Court would have decided the other way with less reluctance. The reason why they determined in that case that the leasehold farms did not pass by that will was because they thought that all the words there used had received in other cases a certain technical construction, and therefore that they were bound by those decisions. But we have not that difficulty to encounter in this case, because here we find another word in the will, "farms," which in its general signification means that which is held by a person who stands in the relation of tenant to a landlord. The extrinsic circumstances also weigh strongly in this case. Therefore taking into consideration the residuary clause in which the items enumerated are all personal chattels, and that the testator did not mean to die intestate as to any part of his property, though the property in dispute is a personal estate, yet as it is connected with land, I think that the construction that this family have put on the whole will is the true construction.

[GROSE, J. and LAWRENCE, J. delivered judgments to a similar effect, and]

The following certificate was afterwards sent to the Court of Chancery: [355]

"We have heard this case argued, and considered the effect of this will, and are of opinion, taking the whole of the will together, that the leasehold property in question is not included in the residuary bequest, but passed by the prior devise, which comprehended the real estate, although some of the limitations applied to the real estate are inapplicable to this property.

"KENYON.
"W. H. ASHHURST.
"N. GROSE.
"S. LAWRENCE."

* 2 P. Wms. 455.

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June 13.

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READ *v.* DUPPER.

(6 T. R. 361—362.)

If the defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit.*

THE principal cause of action, which was for business done by the plaintiff for the defendant, was agreed to be referred to the Master, who awarded a certain sum to be paid to the plaintiff together with costs. The plaintiff afterwards threatened to take the defendant in execution unless the money due to him was immediately paid; whereupon the defendant's attorney, after notice from the plaintiff's attornies not to pay it to the plaintiff himself, because their bill was not satisfied, paid the whole sum to the plaintiff himself. In consequence of which the plaintiff's attornies applied to this Court in the last Term, and obtained a rule calling on the defendant's attorney to shew cause why it should not be referred to the Master to see what lien the plaintiff's attornies had upon the debt and costs recovered in this action as against the plaintiff himself, and why the defendant's attorney should not pay over that sum to the plaintiff's attornies.†

Garrow and *Espinasse* now shewed cause; and said that whatever lien the plaintiff's attornies might have upon the debt and costs recovered as between them and their client in case the money had been paid into their hands, at any rate the defendant's attorney was warranted in paying the money over to the plaintiff himself in the action,‡ especially as the payment appears to have been *bonâ fide*, and in order to preserve his client from being arrested, without even the imputation of collusion. There can be no lien before the subject matter on which it is to attach is in the hands of the party claiming to retain it. And if such

* See *Ross* v. *Buxton* (1889) 42 Ch. D. 190, 199.

† The rule was first drawn up in a different form, but was afterwards thus amended.

‡ *Mitchell* v. *Oldfield*, 2 R. R. 342.

an application as the present were to prevail, an innocent defendant disposed to pay a just debt might be forced to arbitrate between the plaintiff and his attorney on adverse demands made by each, and incur the risk of paying the money twice if he decided wrong.

Shepherd, contrà:

It is an established rule that the Court will support an attorney in his lien upon the costs of the suit, not only where there is collusion between the parties concerned to defraud the attorney of his lien, but also as against *third persons into whose [*362] hands the damages and costs of the suit come, provided the attorney give notice to them in time of his demand before the money is paid over. *Turwin* v. *Gibson*, 3 Atk. 720; *Welsh* v. *Hole*, Dougl. 3 Ed. 238; *Griffin* v. *Eyles*, 1 H. Black. 122. In the second of those cases Lord MANSFIELD expressly said that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong. And what was said by BULLER, J. in *Mitchell* v. *Oldfield*,† must be understood of a payment without notice, which distinguishes it from this case. No inconvenience, such as is suggested, can arise to the defendant or his attorney from adverse claims; for after notice from the plaintiff's attorney it would be a sufficient answer to a demand from the plaintiff himself; or at any rate the party might apply to the Court for a rule to protect him in his payment.

LORD KENYON, Ch. J.:

The principle by which this application is to be decided was settled long ago, namely that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained. If indeed the money had been paid over *bonâ fide* to the plaintiff, before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which

† 2 R. R. 342.

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cannot be suffered. In *Welch* v. *Hole*, Lord MANSFIELD compared this to the case of an assignment of a chose in action, which indeed in legal strictness cannot be done; but still according to the rules of equity and honest dealing if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice.

Per CURIAM: *Rule absolute.*

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BUDDLE *v.* WILLSON.

(6 T. R. 369—373.)

The cause of action in the ordinary case of an action against a common carrier, is essentially *ex contractu*.

THIS was an action upon the case. The declaration which was in Hilary Term stated that the defendant was a common carrier, and accustomed to carry for hire the goods of all persons requiring him from London to Devizes; that by the law and custom of the realm every common carrier who receives the goods of another person so to carry for hire ought to carry them safely and securely, so that no loss or damage may happen to them or to the owners by the default of such carrier or his [*370] servants; that the plantiff on, &c. at, &c. delivered *certain goods to the defendant to be by him safely and securely carried from London to Devizes, and there delivered to one J. Brown for certain gain and hire, &c. yet that the defendant not regarding his duty in this respect did not safely carry, &c. but on the contrary he neglected so to do, and so carelessly and negligently conducted himself in this behalf that by the carelessness and negligence of him and his servants the goods were lost, &c. After an imparlance to Easter Term the defendant pleaded in abatement that the goods mentioned in the declaration were delivered to and received by the defendant and one E. Fromont, J. Porter and J. Dover jointly, they being partners in the trade or business of a carrier, and not by the defendant solely, averring that those three persons were now living. To this plea there was a general demurrer.

Baldwin, in support of the demurrer,† admitted that if in an action of *assumpsit* all the contracting parties were not made defendants the party sued might plead in abatement that the others ought to have been joined with him, but contended that the same rule did not apply to actions of tort: and that this was an action for a tort. In cases of this kind the plaintiff has his option either to sue in *assumpsit*, alleging that the defendants undertook to carry his goods safely and failed, or on the custom of the realm, in which he may simply state the carrier's duty as arising out of that custom and a breach of it by the defendant: but the latter is purely an action for a tort; it is in the nature of a mal-feasance. The case of *Mitchell* v. *Tarbutt*‡ is decisive of the present. There to an action on the case against some of the partners of a ship for the negligence of their servant, whereby the plaintiff's goods were lost, the defendant pleaded in abatement that there were other partners who should also have been sued; and on a demurrer the Court held the plea to be bad, saying that that was an action for a tort. The case of *Boson* v. *Sandford*,§ which is one of the leading cases on this subject, was considered by the Court as an action on a contract: and though Lord HOLT said that it was *ex quasi contractu*, that was an action directly upon the contract, as appears by the report in 3 Lev. 258, and in Carth. 58. He also cited two manuscript cases to shew that in actions like the present such a plea as this cannot be supported; *Perry* *v. *Hunwicks* and [*371] another, H. 32 G. III. B. R.; and *Holdwin* v. *Ibbetson*, lately in C. B. The former (he stated) was an action of *assumpsit* against carriers, to which the defendants pleaded in abatement that there were other partners who ought to have been joined; on which the plaintiff entered up a *billa cassetur*, and then brought another action in case against the same two defendants, to which they also pleaded the same plea in abatement; and on a demurrer to that plea the defendants gave up the point, and the plaintiff obtained judgment. The other case in the Common Pleas was an action against a carrier for the negligence of his servant by which the plaintiff's leg was broken: and after the

† On Friday, June 19th.

‡ 2 R. R. 684.

§ 3 Lev. 258; Carth. 58; Skin. 278; Salk. 440.

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plea of the general issue, an objection was taken at the trial, and afterwards renewed in bank, that other partners ought to have been joined: but the Court of Common Plea held that the action was well brought against one partner only. He also added that great inconvenience would arise to the suitors if such a plea as the present could be maintained; because the proprietors of public coaches generally live in different parts of the kingdom, and their names are not usually known. But, secondly, he insisted that if such a plea were good in substance, this plea could not be supported, because it was pleaded after a general imparlance. * * *

Shepherd, contrà:

First, the general rule need not be disputed that in actions of tort the defendant cannot plead such a plea as the present: but that rule must be confined to cases which are (strictly speaking) actions for a tort, and cannot be applied to such a case as this, where the cause of action arises *ex contractu.* This action is founded on the custom of the realm, and that custom is now considered part of the contract. It is admitted that if the plaintiff had declared in *assumpsit,* the defendant might have pleaded in abatement that the other partners ought to have been joined: then the defendant must have the same right to put in the same plea to this action; for the form of the action cannot alter the nature of it, or the obligation of the parties. The true [*372] *criterion by which to try whether or not such a plea may be pleaded is to consider whether the plaintiff could have declared in *assumpsit* for that which he chooses to convert into an action for a mis-feasance; if he could, then such a plea in abatement may be supported; if he could not, then it is (strictly speaking) an action for a tort, and the defendant cannot plead that other persons ought also to have been sued. Such was the case of *Mitchell* v. *Tarbutt;* the plaintiff could not have declared in *assumpsit,* for in that case there was nothing like a contract. And Lord KENYON in giving his opinion there recognized *Boson* v. *Sandford,* but distinguished that case from it; saying that the case then under discussion arose *ex delicto.* In *Boson* v. *Sandford,* as reported in Salkeld, Lord HOLT said it was an action

"*ex quasi contractu*, and it was not the contract of one but of all; there was no other tort but a breach of trust." With regard to the supposed inconvenience; there is no other inconvenience in this than in any other case where the plaintiff does not sue all the partners; and in all these cases the inconvenience is removed by the plea which gives the plaintiff a better writ. Secondly; neither can any objection be now taken to this plea on account of its having been filed after a general imparlance; for, in the first place, he may plead such a plea even after a general imparlance. In *Dacres* v. *Duncomb*,† where after an imparlance the defendant pleaded in abatement in trover that the plaintiff with two others brought trover for the same goods which was still depending, TWISDEN, J. asked "how came this plea in abatement after an imparlance?" To which HALE, Ch. J. answered, "Though after an imparlance the defendant cannot plead a misnomer or the like, or ancient demesne, because he admits he ought to answer the writ; yet such a plea in abatement as this he may." Therefore a plea in abatement, which shews that the defendant ought not to answer the writ, may be pleaded after a general imparlance. But even if the defendants could not regularly plead in abatement after a general imparlance, this is not the mode of taking advantage of the objection. It is a mere matter of irregularity that a plea is not filed at the proper time: and a mere irregularity cannot be taken advantage of on a demurrer. *Carmichael* v. *Troutbeck*, Tr. 24 Geo. III. B. R. If a plea be filed too late, the plaintiff may sign judgment for want of a plea, as was done in *Doughty* v. *Lascelles;* or he may *apply by motion to set aside such a plea; but this is not the subject of a demurrer. [*373]

The COURT expressed a strong opinion that such a plea as the present might be supported, if pleaded in time, the cause of action arising, as Lord HOLT said, *quasi ex contractu:* but no satisfactory account having been given of the two manuscript cases cited, they ordered the case to stand over. And on this day

† 1 Vent. 235.

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Lord KENYON, Ch. J. said they were clearly of opinion that the plea in abatement was bad, because pleaded after a general imparlance, but that it might have been supported if it had been pleaded in proper time; and his lordship referred to Mr. J. DENISON's opinion in 1 Wils. 282, who said, "The declaration upon the custom of the realm is the same in effect with the present declaration (which was that the defendant undertook in consideration of so much money to carry the plaintiff's goods from one port to another). In the old forms it is, that the defendant suscepit, &c. which shews that it is *ex contractu*."

Judgment of respondeat ouster.

Note.—Although relating primarily to the now obsolete plea of abatement, the case is not without importance on the question as to the essential ground of a carrier's liability—whether contract or tort. There was at one time a parallel question as to whether the usual count against a carrier could be joined with a count in trover. This was finally settled in the affirmative by the case of *Dickon* v. *Clifton* (1766) 2 Wils. 319. The origin of the puzzle doubtless was that the ambiguity, in the case of carriers, is inherent in the law itself.

Lord KENYON's judgment in *Buddle* v. *Willson*, as well as the case of *Boson* v. *Sandford*,* on which it is founded, is impeached by Lord ELLENBOROUGH in *Govett* v. *Radnidge*, 3 East, 69. But the principle is reaffirmed by Sir J. MANSFIELD, C.J. in *Powell* v. *Layton*, 2 Bos. & P. N. R. 365; and Mr. Dicey (on Parties, p. 20), after reviewing these, with other conflicting authorities, supports the view of Sir J. MANSFIELD. *Non nostrum inter vos tantas componere lites.* See further 1 Wms. Saunders, 474, *Foulkes* v. *Metrop. Dist. R. Co.*, (1880) 5 C. P. Div. 157, 49 L. J. C. P. 361.—R. C.

* In Skinner's report (p. 178), which gives the fullest report of the judgment, the case is called *Boulston* v. *Sandiford*.

THE KING *v.* THE EARL OF EXETER.

(6 T. R. 373—374.)

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The lord of a franchise is not, as such, bound to repair a gaol within it; but he may be subject to such charge by immemorial usage.

THE Earl of Exeter was indicted for not repairing the gaol at Peterborough. The first count in the indictment stated that the Liberty of Peterborough is and has been immemorially an ancient liberty, within which there has been time out of mind an ancient and common gaol for the reception and safe custody of debtors, felons and other offenders, taken within the same; that the defendant is lord of the said liberty; and that he and his predecessors, lords of the liberty, have immemorially been used and accustomed and of right ought to repair the said ancient and common gaol whenever the same became decayed and ruinous, &c. It then stated that the gaol was decayed and ruinous, &c. There were five other counts in the indictment, in none of which was it stated that the defendant and his predecessors had immemorially been used and accustomed to repair, &c. The defendant pleaded not guilty to the first count and demurred to the five last counts.

Wood, for the defendant, objected to the sufficiency of the five last counts, because they did not state any immemorial obligation in the defendant to repair the gaol.

Knowlys was to have argued in support of the indictment. [374]
But

The COURT said they would relieve him from the difficulty of endeavouring to support a point which was too clear for discussion. That the first count seemed in this respect to be correctly drawn, because it alleged that the defendant and his predecessors, lords of the liberty, had immemorially repaired the gaol; and that such a charge might be supported in law; for that different obligations were annexed to estates in different parts of the country; that, for example, of repairing the county gaol for Devonshire till lately a charge on Mr. Rolle's estate;

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and that of repairing roads *ratione tenuræ* in a variety of instances. But that the subsequent counts of this indictment could not be supported, because they did not contain a similar allegation with that in the first count; and that the lord of a franchise was not bound, merely as lord, to repair the gaol within it, without an immemorial usage to charge him.

Judgment for the defendant on the five last counts.

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MOSS AND OTHERS *v.* BYROM.

(6 T. R. 379—383.)

The assured upon a trading voyage taking out a letter of marque [but without a certificate which is necessary to its validity] unknown to the underwriters solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. And if the captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel is afterwards lost in consequence of it, it is an act of barratry, upon which the assured may recover against the underwriters, although the captain libelled the prize for the benefit of his owner as well as himself.

THIS was an action on two policies of insurance in the common form on goods from the Bahama Islands to Liverpool. The vessel on board of which the goods were shipped belonged to one Edward Caley, whose agent chartered her to the plaintiffs for a trading voyage from Liverpool to the Bahama Islands and back again to Liverpool. The first of these policies was effected on the 15th May, 1793, and the other on 30th October, following, in consequence of instructions received by one of the plaintiffs residing at Liverpool from the others at one of the Bahama Islands. About the middle of May, 1793, the vessel, then at the Bahamas, had completed her lading, and had taken in guns and ammunition for the purpose of defence, and was to have sailed on the 20th of that month: but being found to be leaky, she was unloaded and repaired, and was completely loaden again by the 14th of September, following, Previous to this the assured endeavoured to procure seamen for the voyage; but could not procure any to enter, in consequence of a notion

prevailing amongst them that the enemy had threatened to treat as pirates the crews of every vessel who made any resistance to them, unless they were furnished with letters of marque; and it was known amongst them that this vessel had guns on board for the purpose of defence. The time pressing much for the departure of the vessel, the plaintiffs at the *Bahamas in order to quiet the apprehensions of the seamen and induce them to enter, agreed to procure letters of marque, which was accordingly done; but without any intention on the part of the plaintiffs to made use of such a commission for the purpose of cruising or making reprisals.† And when in consequence of this the seamen entered, the same agreement was made with them as in ordinary cases of trading voyages. It also appeared that no certificate of clearance was taken out, such as is required by the 33 Geo. III. c. 66, s. 15, without which the letter of marque is declared void and the commander subjected to a penalty of 1,000*l.* for departing without it: [the taking out of these certificates was stated to have been required by previous statutes in time of war, and to have been the usage in these cases.] It also appeared to have been part of the written instructions of the plaintiffs to the captain before he sailed to proceed to Liverpool with all expedition and deliver his cargo there agreeably to the charter-party, and the same was verbally repeated to him just before he sailed; and no mention was made in those instructions of the letter of marque. The vessel was deeply laden with merchandise to the amount of about 10,000*l.* on account of the plaintiffs. A few days after the vessel sailed on her voyage homewards, the captain intimated his intention to cruise for prizes; some of the seamen objected to it, as not coming within the scope of their engagement; the majority of them, however, agreed to it, and they soon fell in with an American ship, which they boarded and plundered, and afterwards released. They then cruised for some days longer out of the course of the voyage insured, and chased and captured a vessel of the enemy, which the captain sent into Bermudas and followed there himself, and

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† There was a contrariety of evidence at the trial on these different facts, but on a motion for a new trial the Court gave judgment as on this statement of them.

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libelled his prize in the proper court in the name of himself and his owner, and shortly after, during his stay there, his own vessel was driven on shore in a storm, and the cargo was lost. In the course of his cruising he directed that no mention should be made of it in the log book. At the trial the jury found a verdict for the plaintiffs on the ground of a loss by the barratry of the master; to set aside which a rule *nisi* was obtained on two objections; 1st, that this was barratry; 2ndly, that the taking of a letter of marque on board without the knowledge or consent of the underwriter varied the risk and avoided the policy.

[381] *Erskine*, *Garrow*, and *Giles* were to have shewn cause against the rule: but the Court desired to hear

Law and *Gibbs* in support of it:

This comes directly within the case of *Denison* v. *Modigliani*,* where it was held that taking on board a letter of marque without the consent of the underwriter avoids the policy, inasmuch as it essentially varies the risk by holding out a temptation to the captain to cruise. It cannot be denied that the letter of marque was the operative cause which produced the loss. It is equally clear that it was procured with the consent of the plaintiffs, and that they did not disclose that circumstance to the underwriters at the time of effecting the policy. It is said in answer that the letter of marque was only taken on board for the purpose of encouraging the seamen to enter, and that they could not have been procured without: but it was the plaintiff's duty to procure a sufficient number of men to navigate the ship, and part of his implied engagement with the underwriters; and he was not warranted in resorting to an expedient for that purpose which increased their risk. Then it is urged that as the insured instructed the captain not to use the letter of marque, it did not vary the risk: but it did vary the risk, if it tempted the captain to do the acts which he did. It authorised him to take prizes, which could not be attempted without adding to the risk of the insurers, independently of the temptation to deviate by cruising

* 5 T. R. 580.

The same argument was insisted upon and over-ruled in *Denison* v. *Modigliani;* which is directly in point upon this head, with this additional and striking circumstance, that here the captain did give way to the temptation, and make use of the power which the assured put into his hands; whereas in that case the captain did not act under the letter of marque, but the bare possession of it was held sufficient to vacate the policy. * * *

Lord Kenyon, Ch. J.: [382]

The case of *Denison* v. *Modigliani* which was decided on principles that were new, and which went to the extreme verge, has been much pressed upon us in the argument of the present case as deciding it: but that case ought not to be extended farther, and the present is certainly distinguishable from it. I confess I wish that case had appeared on a special verdict, in order that the parties might, if they had pleased, have carried the record to the *dernier ressort;* for I understand that the decision has since been doubted; though on a review of that case I do not know that it was improperly decided. In that case legal letters of marque were taken out for the ship, and though the underwriters expressly refused their consent, the assured nevertheless obtained them; and they could have been obtained for no other purpose but that of empowering the ship to make captures: whereas here no legal letters of marque were taken out, for it appeared that no certificate was obtained, without which the letters of marque were void, and it appeared that they were only taken out for the purpose of procuring seamen. In the one case, letters of marque empowering the captain to make prizes were taken out; in the other only illegal letters of marque were taken out; and therefore in this respect the two cases are unlike. But it is argued that an act was done by the captain of this vessel that put an end to the policy before any loss happened for which the underwriters are liable, for that he stopped the American ship to take the dollars out of her: but, in answer, I say that that very act was a barratrous taking; and that if the captain had not afterwards taken the prize, that act in itself was barratry in the captain, because it was contrary to his duty to his owners. It

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was contrary to his duty, and to the prejudice *of his owners, because they stipulated by the charter-party that the ship should sail directly to Liverpool; and therefore they were liable to the freighters for any damage that might happen in consequence of that deviation.

Grose, J. declared himself of the same opinion.

Lawrence, J.:

Three points have been made in this case. 1st, that the risk was varied in consequence of the letters of marque being taken on board, and that that put an end to the policy; 2ndly, that this was not barratry; and 3rdly, that the account given by the plaintiffs of the reason for taking out the letters of marque ought not to have been believed: but the last was a question for the jury alone to decide. As to the second; there is no doubt but that there was barratry against the owners; according to the terms of the charter-party the ship was to proceed directly to Liverpool; and whatever was done by the captain to defeat or delay the performance of the voyage was barratry in him, it being to the prejudice of his owners. And though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it was barratry. When therefore he stopped the American ship to examine and to plunder her, he was guilty of barratry against his owners, because if any loss or accident had happened to the ship during that time, his owners would have been responsible for it to the freighter of the ship. With regard to the first point, the case of *Denison* v. *Modigliani* is distinguishable from the present for the reason given by my Lord, namely, that in that case there was a legal letter of marque on board to enable the captain to take prizes. But here the letter of marque was not obtained for the purpose of enabling the ship to cruise, but of procuring seamen on board; when the seamen were procured, the letter of marque ceased to have its effect; and then it was the same as if there had been no letter of marque on board at all. If the captain, having this letter of marque, did any act which increased the risk, that comes within the second point, namely,

barratry; but if he had it on board without increasing the risk that does not affect the policy. The case of *Denison* v. *Modigliani* stands on its own circumstances; there the conduct of both parties shewed that it was their mutual understanding that the letter of marque should not be put on board the vessel.

Rule discharged.

HICKEY *v.* HAYTER, Administratrix.

(6 T. R. 384—388.)

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A debt on a judgment against a testator or intestate, not docketed according to the directions of the stat. 4 & 5 W. & M. c. 20,* is put by that act on a level with simple contract debts. On a plea of *plenè administravit*, to debt on a judgment against the intestate not docketed, the defendant may give in evidence payment of bond and other specialty debts, which exhausted all the assets.

This was an action of debt on a judgment recovered against the intestate in his life-time, to which the defendant pleaded *plenè administravit*. At the trial before Lord Kenyon at the sittings after the last term the plaintiff gave in evidence an inventory of the intestate's effects signed by the defendant, in which it appeared that she had received assets to the amount of 374*l*. In order to discharge herself she proved payment of bond and other specialty debts amounting to 618*l*. The plaintiff contended that the payment of these debts before the plaintiff's, which arose on a judgment regularly entered up against the intestate, was a *devastavit* in the defendant. This was answered on the part of the defendant by saying that as the judgment was not docketed in pursuance of the stat. 4 & 5 W. & M. c. 20,* it was not entitled to any preference over any other debts. A verdict however was taken for the plaintiff with liberty to the defendant to move to set it aside and to enter a nonsuit if this Court should be of opinion with her on the construction of the Act of Parliament. And a rule having been obtained for that purpose it was now opposed by

Erskine:

First, the stat. 4 & 5 W. and M. c. 20, is confined to

* See now 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 1; 23 & 24 Vict. c. 38, s. 3.—R. C.

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judgments as affecting lands and tenements only; the third section merely providing that "no judgment not docketed shall affect any lands or tenements as to purchasers or mortgagees." And the other words that follow "or have any preference against heirs, executors or administrators" mean the heirs, executors or administrators of such purchasers or mortgagees; for it goes on to say, "in their administration of their ancestors' testators' or intestates' estates," without adding "or effects.' But 2ndly, even if the meaning of the statute were as the defendant contends it is, she cannot avail herself of it on these pleadings. The great object of pleading is to reduce the whole case to a single point, in order that the adverse party may not be surprised, but may be prepared with evidence at the trial on that point. But the plea of *plenè administravit* gave no notice to the plaintiff of the defence which was set up; to enable her to give this matter in evidence [*385] the defendant should have pleaded that the *judgment on which the action is brought was not docketed, and that the defendant not being apprised of any such judgment had paid other debts of an inferior nature.

Vaughan in support of the rule:

Before the stat. 4 & 5 W. and M. c. 20, executors and administrators were bound to take notice of judgments recovered against their testators or intestates; and it was no plea to an action against an executor on such a judgment that he had no notice of the judgment, and paid debts of an inferior nature, *Littleton* v. *Hibbins*, Cro. El. 793. Executors were also bound to take the same notice of a decree in equity that they were of a judgment at common law, *Shafto* v. *Powel*, 3 Lev. 355. And it was to remedy this mischief, the hardship on executors who were affected by judgments of which thay had no notice, that the stat. 4 & 5 W. and M. was passed. Being a remedial law, it ought to be construed liberally. *Heydon's* case, 3 Co. 7. And both the preamble and the enacting clause expressly mention executors and administrators. The former recites "the mischiefs and damages that happen to executors and administrators and also to purchasers and mortgagees by reason of the difficulty there is in finding out such judgments;" and the third section

provides "that no judgment, not docketed, shall have any preference against heirs, executors or administrators in their administration of their ancestors' testators' or intestates' estates." The mischief to be remedied is not recited to have happened, as the plaintiff contends, to purchasers and mortgagees and their executors or administrators, but to the executors and administrators of persons against whom judgments had been obtained, and also to purchasers and mortgagees; and the remedy provided in the third section is co-extensive with that mischief. At common law the plaintiff's was a debt of a superior nature to those paid by the defendant; and if the latter had paid debts of an inferior nature, she would have paid them in her own wrong; but the statute says that a judgment not docketed shall have no preference; and therefore such a debt is reduced by the statute to a level with simple contract debts. And Mr. Justice Blackstone,† speaking of the order in which debts are to be paid by executors, says, "fourthly, debts of record as judgments docketed according to the stat. 4 & 5 W. and M. c. 20." Secondly, it was competent to the defendant under the plea of *plenè administravit* to shew that the plaintiff's judgment was not docketed. By that plea she *admitted the validity of the judgment debt, but denied the preference claimed by the plaintiff. The plea is that she had no assets with which she could have satisfied the plaintiff's debt; and the truth or falsehood of that plea depends upon this question whether or not the defendant in administering the intestate's effects and paying his debts observed those rules which the law prescribes; if she had paid all the money she had received in satisfaction of debts of a superior nature or those in equal degree, she had fully administered; if she had paid debts of an inferior nature, then her plea was false, and she had not fully administered. So that the direct question put in issue on these pleadings was the preference which the plaintiff's debt had over the other debts of the intestate. And if she had pleaded specially that the plaintiff's judgment was not docketed, it would only have amounted to a special plea of *plenè administravit*. If this had been an action on a bond, the defendant might have given in

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† 2 Bl. Com. c. 32.

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evidence under this plea payment of judgment debts. Or if the plaintiff's judgment had been docketed, and the defendant had paid debts of a superior nature, debts to the crown, she need not have pleaded that matter specially, but might have given it in evidence under this plea of *plenè administravit:* so in this case it was equally competent to her to prove under this plea that she had paid debts of a superior nature to the plaintiff's, because it was proving in the terms of her plea that she had fully administered.

LORD KENYON, Ch. J.:

It is rather extraordinary that, though this statute has been passed for an hundred years, this question should now be brought forward for a decision for the first time, although frequent instances have occurred in which it was necessary to decide upon the statute as far as the judgments affect lands: however as the question is now brought before us, we are bound to decide according to the statute. I confess I adopt the argument used by the defendant's counsel; this Act of Parliament meant to put executors and administrators in a state of security, provided they used due diligence in administering their testators' or intestates' effects. It directs that all judgments shall be docketed by the officers of the respective courts, and put into an alphabetical order, that the parties interested in such judgments may by searching the proper records know what judgments are outstanding; and if the plaintiff had regularly docketed his judgment, the defendant by using due diligence would have [*387] known that there was such a judgment signed against *her intestate: but as the plaintiff did not pursue the directions of the Act, the defendant could not by searching in the proper office have learnt that the judgment was properly signed. If this had been the case of a bond, and the plaintiff had given notice that he had such a debt before the defendant had paid debts of an inferior nature, she would have been bound to pay the bond first: but the Act of Parliament expressly says that "no judgment not docketed and entered in the books as aforesaid shall affect any lands, &c., or have any preference against heirs, executors or administrators in their administration of their

ancestors' testators' or intestates' effects." The defendant by her plea admits that the plaintiff has recovered a judgment against her intestate, but she does not by that admit that this judgment is to overturn all that she has been doing in the course of her administration, because the judgment is not docketed. And late as the time is when this question comes before us, we must give effect to the Act of Parliament. It never has been doubted but that this is the operation of the statute respecting lands; and I think it is equally clear that this case comes within the mischief and the provisions of the Act. The plaintiff who relies on his judgment, and wishes that that judgment should disaffirm everything that the administratrix has done, should have gone further and have shewn that his judgment was docketed. If the defendant indeed had had notice of this judgment debt, perhaps she would have been warranted in paying it before the bond debts: but in order to make her liable as for a *devastavit*, the judgment should have been docketed. I doubt whether any other notice of the judgment than that required by the statute would have been sufficient for this purpose; it is best to abide by the words of the Act of Parliament.

ASHHURST, J. declared himself of the same opinion.

GROSE, J.:

The question is whether a debt on a judgment, not docketed, is a debt of a superior nature to a bond debt; to this the statute gives the answer in the negative. It is said however that the statute only extends to purchasers and mortgagees of lands: but the latter part of the clause says directly the reverse; for it goes farther and enacts that such a judgment shall have no preference against heirs, executors or administrators, &c. Now if it is not to have any preference, it is only to be considered as a simple contract debt. Then as to the form of the pleadings: on the issue on *plenè administravit*, the defendant was to shew that she had paid *debts not of an inferior nature to the plaintiff's; the [*388] plaintiff contends that his debt is of a superior nature to those paid by the defendant, because it is a judgment debt; but the

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HICKEY v. HAYTER.

statute says that it is not to have any preference unless it be docketed.

LAWRENCE, J.:

The Act of Parliament having said that this debt shall have no preference because it is not docketed, it is put on the footing of a simple contract debt; and on the plea of *plenè administravit* the administratrix may give in evidence payments of all debts not of an inferior nature. Before this Act of Parliament this case would have come within that of *Littleton* v. *Hibbins;* though in 2 And. 159, the Court thought that an executor ought not to be charged with a judgment of which he had no notice. If simple contract debts had been paid by the administratrix before a bond debt without notice of the latter, such payments must have been pleaded to an action on the bond, because bonds are still on the same footing that they were before the Act of Parliament: but the statute puts a judgment not docketed on a level with simple contract debts, and therefore payment of the bond debts in the present case was properly received in evidence under the plea of *plenè administravit.*

Rule absolute.

1795.
June 22.
[388]

WITHNELL, CLERK, *v.* GARTHAM, CLERK.

(6 T. R. 388—398.)

Churchwardens though not a corporation, have a *quasi* corporate character, so that in a deed giving the nomination to an office, to the vicar and churchwardens, the intention is easily inferred that the vicar and the majority of churchwardens should nominate.

[THE question in this case was whether the appointment of a schoolmaster by the vicar and the majority of churchwardens, (of whom there were eleven), was a good appointment under the terms of the deed of foundation (which was made in 1548). By the concurrent judgment of the King's Bench, the intention was collected from the deed that the vicar and a majority of the churchwardens should nominate; and the appointment was held good. The following observations of Lord KENYON appear to contain all that is of general interest in the case.]

LORD KENYON, Ch. J.:

It is sometimes difficult to get rid of first impressions; and from the time when this case came before the Court the first time down to the present moment I have had no doubt in my mind about it. Upon reading the deed itself perhaps it may be said to be a little *in dubio* whether these churchwardens should or should not be considered as a corporation for this purpose. In the course of the argument the defendant's counsel said that the churchwardens of a parish are a corporation for a particular purpose, namely, to take care of the goods of the church; but, speaking in legal language, that is not so; they are in that case only *quà* a corporation. If they were a corporation, actions should be brought against them in their corporate name, and any damages recovered against them would be recoverable out of their corporate estate: whereas all actions must be brought against them in their individual names, for they have no corporate name; damages must be recovered against them personally, and not to be paid out of their corporate estate, for they have none: and if they go out of office before the action is concluded, it does not survive and go to their successors. Therefore I take it that they are *quà* a corporation only. It has been said that according to some of the old cases there is a difference between those cases where a power is given to persons *nominatim*, and those where it is given to them by the name of their office; that in the latter, the survivors may act though some of the original persons are dead, though when they are mentioned by name they cannot: as far as that distinction goes, it is in support of our determination in this case. But the whole of that doctrine is founded on law, which was perhaps a little doubtful in its origin, and was the occasion of making the statute 21 Hen. VIII. c. 4. For it appears by the preamble that that Act was passed rather to remove doubts than to make a new law: it recites that such a sale of lands "after the opinion of divers persons can in nowise be good or effectual in the law, &c." * * *

K. B. MICHAELMAS TERM.

1795.
Nov. 20.

[411]

STONE AND ANOTHER *v.* CARTWRIGHT.

(6 T. R. 411—413.)

No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal or those actually employed are only liable.

THE declaration stated that the plaintiffs were possessed of a certain close in Tipton in the county of Stafford, and also of a dwelling house, &c. there: that the defendant was possessed of a certain coal mine under the surface of the said close and house, &c.; and that the defendant well knowing the premises, but contriving, &c. to injure the plaintiff, &c. worked and caused to be worked, &c. his said mine of coal in a negligent, incautious and unskilful manner, and neglected to leave necessary and sufficient pillars, &c. to support the said buildings and premises of the plaintiffs and the soil, &c.; by reason whereof the surface of the said close sunk and gave way, &c. and the buildings, &c. were rent and rendered dangerous. It appeared at the trial before Lord Kenyon at Stafford that the colliery belonged to A. M. Ward an infant, and that the defendant had been appointed agent and manager thereof under the Court of Chancery; that he employed a bailiff under him who superintended the work; that [*412] he hired and dismissed the colliers at his pleasure, but *that he took no personal concern in the business, was not present when the injury complained of was done, nor had given any particular orders for working the mine in the manner which had occasioned it. Upon this evidence Lord KENYON was of opinion that the action could not be maintained against the defendant, who was the middle man, but that it ought to have been brought either against the person who actually committed the trespass or concurred therein, or against the superior, the owner of the colliery, for whose benefit the work was carried on: and he referred to a case of *Gwinne* v. *Poole*, 2 Lutw. 935. The plaintiffs being nonsuited,

Russell now moved to set aside the nonsuit; contending that in tort all were principals, and amesnable as well for the acts done by themselves as for those done by their servants or persons acting under their authority. The defendant was the acting manager of the estate, and had the sole power of appointing or dismissing those workmen by whom the injury was committed; he must therefore be considered as the master or owner, at least in respect of strangers. * * *

LORD KENYON, Ch. J.:

There is no pretence whatever for imputing liability to the defendant in this action: it might as well be contended that a similar action would lie against the steward of another for all the defaults of improper conduct of the men employed under him by which any other person received damage. In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done: but it was never heard of that a servant who hires labourers for his master was answerable for all their acts. The present defendant has no interest in the colliery, nor was *it worked for his benefit: he was no more than a steward [*413] appointed by the Court of Chancery. His Lordship mentioned the cases of *Gwinne* v. *Poole*, 2 Lutw. 935; and *Goodwin* v. *Gibbons*, 4 Burr. 2108, where this question had been considered.

ASHHURST, J. declared himself of the same opinion.

GROSE, J.:

It frequently happens that a person's gardener employs labourers under him, yet it could never be contended that on that account he would be answerable for damage done by them in the course of their employment.

LAWRENCE, J.:

If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case: but no

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such evidence being adduced, I think the opinion delivered at the trial was perfectly right.

Rule refused.

1795. *Nov.* 11.

[413]

ROTCH *v.* EDIE.

(6 T. R. 413—426.)

A policy of assurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c., extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the assured may abandon and recover as for a total loss.†

THIS action was brought to recover a loss upon three several policies of insurance, underwriten by the defendant in November, 1792; the first for 100*l.* on one half the *Adelaide*, her stores, boats, provisions, and fishing materials, valued at 1,000*l.*; the second for 100*l.* on one half the *Adele*, her stores, boats, provisions, and fishing materials, valued at 1,200*l.*; and the last for 150*l.* on one half the *Victor*, her stores, boats, fishing materials, valued at *l.* The insurance both upon the *Adelaide* and *Victor* was at and from L'Orient, upon the *Adele* at and from and after her arrival at L'Orient; and on each of the three to all ports, seas, and places whatever beyond and on this side the capes of Good Hope and Horn on the Southern whale and seal fishery and trade and until the ships' safe arrival back at L'Orient, with liberty to trade or take freight without prejudice to the insurance, at a premium of 10 guineas per cent. subject to a return of 3*l.* per cent. if the ships should arrive back at L'Orient within fourteen months from the time of sailing. The policies were in the usual printed form; insuring (amongst other perils) against arrests, restraints, and detainments, of all kings, princes and people of what nation condition or quality soever, and against all other perils losses and misfortunes that should come to the hurt, detriment or damage of the said ships. The declaration [*414] stated the losses to have happened by the ships *and their stores, boats, &c. being by the authority of certain persons exercising the powers of government there (that is, at Port Louis with respect

† See *Rodocanachi* v. *Elliott* (1873) L. R. 8 C. P. 649, 667, 42 L. J. C. P. 247, and (C. A.), L. R. 9 C. P. 518, 43 L. J. C. P. 255.—R. C.

to the *Adelaide*, and at L'Orient with respect to the two others) arrested and restrained from further prosecuting their voyages; and that they had from thence hitherto been detained and prevented therefrom under and by virtue of such restraint. The defendant pleaded the general issue, and paid the premiums into Court. [The cause was tried before Lord Kenyon in December, 1793, when the jury found a verdict for the plaintiff, subject to the opinion of this Court on a case, stating the facts which it was agreed should be treated as having been specially found by the jury.] The defendant subscribed the policies on the ships *Adelaide*, *Victor* and *Adele* in the declaration mentioned. The policies were effected by Gairn Young & Co. agents for the plaintiff in pursuance of orders for that purpose. The plaintiff and J. J. Berard of L'Orient in France had each a half concern and interest in the ships and their stores; and the plaintiff's interest in the *Victor* where the policy is not a valued one exceeded the money insured upon it. The *Adelaide* sailed from the port of L'Orient on the voyage insured on the 27th of January, 1793, and through stress of weather returned back; and put into Port Louis, about two miles distant from L'Orient. Whilst she was lying at Port Louis, and whilst the ships *Victor* and *Adele* were preparing for the voyages in the policies mentioned, and before the usual and necessary passports and clearances for the two last ships were obtained, viz. on the 5th of February, 1793, an embargo was laid on all French vessels in the ports of L'Orient and Louis by the judge of the Admiralty Court at L'Orient, by virtue of and in obedience to a letter received by him from the French minister of marine, dated Paris 30th January, 1793. The ship *Adelaide* was on the 12th of February brought by the order of J. J. Berard and the plaintiff from Port Louis to L'Orient, and such part of the stores of the said vessel as was perishable was sold at L'Orient by virtue of an order afterwards obtained for that purpose by the plaintiff and J. J. Berard from the commercial court of L'Orient. And the three vessels and the remainder of the stores now remain at L'Orient. The *Adele* and *Victor* were ready for sea when the embargo arrived. The *Adele* had finished her coppering about the middle of January; and her water and boats were on board, and everything else provided for

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the voyage and in the magazines. Everything (except provisions and some trifling stores) was on board the *Adele* and *Victor*, and those *provisions and stores were actually provided and in the magazine close to the sea, and the crews were provided and had signed their names to the muster roll previous to the embargo. When the ships were stopped by the embargo, and the mariners saw no prospect of getting out upon their destined voyages, they left the ships. The *Adele* and *Victor* had entered outwards for the voyages insured before the embargo came. The embargo alone prevented the ships sailing, as in consequence thereof the clearances and passports were not granted. The embargo remained in force upon all ships in the port of L'Orient and Port Louis till the 18th of March, 1793, and has ever since that time continued in force upon all ships destined for long voyages; and no ships have been yet permitted to sail but such as were employed in the service of the government, or such as were engaged upon short coasting voyages. The stores continued to be put on board until the 11th of February; notice of abandonment was given to the underwriters on the 26th of February, 1792, and a total loss claimed by the insured; and the like notice and claim were repeated in August, 1793. The plaintiff offered to sell the ships, and make the most of the property for the benefit of the insurers. The plaintiff is a native of the island of Nantucket in North America, and formerly resided for several years in London, but for some years previous to the insurances in question the plaintiff dwelt at L'Orient in France, and was jointly concerned in the Southern whale fishery with Mr. Berard who is a native of France resident at L'Orient, and whose interests in the ships were insured by separate policies effected by Herries & Co. his separate agents. The plaintiff shortly before making his insurances came to England, and returned to France previous to the commencement of hostilities with Great Britain, and having remained there about four months returned again to England, and has resided in England ever since.

It was further agreed that the above facts, with all requisite formalities should be entered on the record as found specially by the jury, in case the party against whom the judgment of this

Court should be given should be advised to bring it before a Court of Error.

This case was argued in Trinity Term last by *Marryatt* for the plaintiff, and *Giles* for the defendant, and now by *Park* for the plaintiff and *Law* for the defendant.

Arguments for the plaintiff:

1st, The plaintiff being a neutral subject has a right to *recover his separate share insured against the underwriter although connected in trade with a subject of France; and therefore does not fall within the prohibition which has been laid down by the Court in several late cases.† 2ndly, The loss falls expressly within the words of the policy by which the ship is insured, "at and from L'Orient, against the arrest and detainment of princes," &c. The question is whether a detainment in the loading port is an exception implied in the nature of the contract. [Passages were here cited from Roccus‡ relating to embargoes, and from Le Guidon relating to abandonment.] In *Green* v. *Young*§ the insurance was upon a ship from her arrival at ——— in Jamaica, during her voyage to London an embargo was laid upon the ship by the government, who afterwards seized and converted it into a fire-ship; and in an action upon the policy, HOLT, C. J. inclined to think that this would not excuse the underwriters, being within *the words "detention of princes, &c." However the matter was ultimately referred. Though it does not indeed expressly appear that that was the case of a detention in the loading port, which is however very probable, at any rate it is an authority against the principle upon which the supposed exception in this case is founded, namely, that the assured impliedly undertakes that the ship shall not be detained by the governing power under whose protection she is laden; and though there was an actual conversion stated in that case, yet the prejudice is the same to the assured as the bare detention in this case. And in *Goss* v. *Withers*,‖ Lord MANSFIELD laid down the same general principle, where he said that by the general law the assured may

[*416]

[*417]

† *Brandon* v. *Nesbitt*, p. 109, *ante*; *Bristow* v. *Towers*, 6 T. R. 35.

‡ *Vid.* Park on Insurance, pp. 87, 88.

§ 2 Lord Raym. 840.

‖ 2 Burr. 696.

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abandon in the case merely of an arrest on an embargo by a prince not an enemy. Such is precisely the plaintiff's situation, to whom the French are no enemies. * * *

Arguments for the defendant:

1st, An embargo at the loading port to which the ship belonged, and where the assured owed a natural or temporal allegiance [*419] to the governing power, is not a risk within the *meaning of the policy insuring against the detainments, &c. of princes, &c. 2ndly, There was no loss in regard to the subject matter of the insurance which is on the ship, &c. 3rdly, The plaintiff had no right to abandon as for a total loss under the particular circumstances of this case. 1st, an embargo is not one of the perils specifically insured against in the policy, and must therefore be brought by implication under the words "arrest and detainment of princes, &c.:" but this has never yet been construed to extend to arrests and detainments in the loading port; because, like sea worthiness, it is a condition necessarily implied in the contract of insurance that the ship may legally sail from the loading port. And it has been decided that the general words at the end of the policy, "all other perils," do not extend beyond the perils specified.† The assured though not a native of France yet had his domicile and was carrying on trade there at the time of the insurance, and consequently owed a temporary allegiance to the government, against whose acts therefore it was not lawful to insure. And if according to the principle of *Hornby* v. *Houlditch* ‡ and *Wadham* v. *Marlow* § every man's assent is to be implied to a public law, the plaintiff cannot be permitted to take advantage of his own act against the underwriter. Suppose a similar case of embargo in the ports of this kingdom, it could not be permitted to a subject, on the principle of the case of *Foster* v. *Thackery*,‖ to insure against the acts of the state, inasmuch as it would create an interest in him to contravene the laws of his own country. But this holds stronger in the case of insurance of property in an enemy's port: because

† *Nesbitt* v. *Lushington*, 2 R. R. 519.
‡ 1 T. R. 96, and Andr. 40.
§ 1 H. Bl. 438, *n*.
‖ 1 R. R. 149.

the same principle which governed the judgment of the Court in *Bristow* v. *Towers* † and *Brandon* v. *Nesbitt* ‡ in the cases of insurance of property of natural born subjects of France, applies as strongly in the case of a foreigner domiciled in France and carrying on trade from thence: it equally tends to create an interest in the subject here to defeat the policy of the State in their endeavours to destroy the trade of the enemy and thereby cramp their resources. Suppose it had been stated in terms in the policy that it was to extend to any embargo that might be laid on by the government of France in preparation for hostilities against this *country; that surely could not have been maintained; and yet such was the fact in the present instance. But considering the assured even as an alien amy, this is not a risk within his contemplation; because in case of an embargo other than by hostile foes the government itself is bound to recompense the injury sustained; and the effect of this action is to save the enemy harmless at the expense of one of our own subjects. [Here the passage cited from Roccus was commented on, and a further passage from Le Guidon cited with reference to embargoes. The ordinances of France, and of Bilboa, were also cited.] 2ndly, But at any rate there was no loss within the terms of the policy, which is not upon the voyage or freight, but merely on the body of the ship, stores, boats, provisions, and fishing tackle. * * The case falls expressly within the principle of *Robertson* v. *Ewer*,§ where a policy on the body of the ship was held not to extend to seamen's wages or provisions consumed during an embargo. * * 3rdly, There can be no abandonment as for a total loss merely upon a loss of the voyage, unless it be by some peril within the terms of the policy. Here the whole subject-matter of insurance remains entire without any detriment; and not only so, but is at this time in the possession and disposition of the plaintiff for every other purpose than that of making a long voyage. The only loss which the plaintiff has sustained is the profit of the voyage, which would include the freight; and as freight is a separate subject of insurance he may recover the same loss twice, if he can recover in this action.

[*420]

† 6 T. R. 35.
‡ P. 109, *ante*.
§ 1 R. R. 164.

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LORD KENYON, Ch. J.:

I am glad to see the reservation at the conclusion of the case that the defendant, if he should be dissatisfied with our decision, may by turning this into a special verdict remove the cause into the Court of dernier ressort, not indeed on account of any difficulties that have presented themselves to my mind upon the subject, but because it is proper that great commercial questions should be so satisfactorily determined as to leave no room for doubt in after-ages. To the citation of passages from foreign writers, with whose works we are not perhaps so conversant as with the productions of this country, I am always inclined to listen with great attention and respect: but having heard and considered those that appear to be the most respectable upon this point, I think that they all seem to agree with the plain construction that an English court of justice would, without such assistance, put upon such a contract as the present. In determining this case, however, I desire not to say one word, though perhaps there will not be much difficulty in it when it comes to be considered, relative to the effect of an embargo laid on by this country on a ship insured in a port here: it is sufficient to decide this case on the facts here stated.

The plaintiff in this case is not under any disability to sue in an English court of justice; he is not an alien enemy, but a native of America, now resident in this country; and being the owner of a moiety of certain ships in a port of France applied to some underwriters in this country to insure that property; the policies were effected, by which the underwriters engaged to indemnify him against certain enumerated perils, among which is that of "arrests, restraints, and detainments, of all kings, princes, and people, of what nation condition or quality soever;" and the insurance is "at and from L'Orient." The ships which were in the port of L'Orient at the time of the insurance have been detained there ever since, two or three years; on which the plaintiff says that he has lost his voyage and the use of his ships, and he desides to abandon to the underwriter and to recover as for a total loss. He is now told that this detention is not within the risks of the policy: but this answer is built on artificial reasoning only. Without being encumbered with foreign ordi-

nances and foreign books, I am utterly at a loss to conceive where the difficulty lies. The plaintiff has in fact lost the voyage, the ships have been detained either *by kings, princes, or people, the governing power of the country where she is: and the plaintiff now applies under the contract of indemnity made with the defendant to recover a satisfaction for the injury which he has actually received. It is not necessary to go through all the cases cited, because the result of all that inquiry leads one way, in favour of the plaintiff. The passages cited from some of the most respectable authorities are directly in point; those from Roccus and Le Guidon, which are inserted in Park's Insurance. So too is the case before Lord Ch. J. HOLT,† which, though only a *nisi prius* case, and that not an absolute decision, yet was the opinion of a judge whose name gives a sanction to everything he said. In rank with Lord HOLT may also be put Lord MANSFIELD, who in *Goss* v. *Withers* ‡ said that the assured may abandon and recover as for a total loss in the case of an arrest on an embargo by a prince not an enemy. It seems therefore impossible to decide this case in favour of the defendant in opposition to all these authorities, and to the plain and obvious meaning of the words of the policy. The defendant's argument would extend much beyond this precise case; for according to that if a ship were loading in a foreign port and captured there as prize on a declaration of war, the underwriters would not be responsible; which is absurd: many other instances of the same kind might be put, to show the fallacy of that argument. The words of the policy are in favour of the plaintiff; and the opinions of eminent lawyers in this country and of foreign writers all lead to the same conclusion, namely, that this is a loss within the meaning of the policy, which extends to losses in general, and without exception, in the loading port: and therefore the defendant is bound to make good that loss.

ASHHURST, J. GROSE, J. and LAWRENCE, J. delivered judgments to a similar effect.

Per CURIAM: *Postea to the plaintiff.*

† *Green* v. *Young*, 2 Lord Raym. 840. ‡ 2 Burr. 695.

1795.
Nov. 19.

[456]

RANDLE *v.* FULLER.

(6 T. R. 456—457.)

The lien of the plaintiff's attorney upon the debt and costs recovered in the cause must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff, upon a summary application to the Court.

A RULE was obtained to show cause why the Master should not, upon taxation of the costs in this cause, set off the sum of 37*l.* 3*s.* 6*d.* against such costs as should upon taxation be found due from the defendant to the plaintiff, and if more should be found due to the plaintiff than that sum then why upon payment of the balance execution should not be stayed. This was founded upon an affidavit stating that the above-mentioned sum was due from the plaintiff to the defendant upon a judgment in a former action; and that the plaintiff had already received part of his debt under an execution.

Shepherd showed cause upon an affidavit of the plaintiff's attorney, claiming a lien upon the costs and damages recovered in the present action, and requiring to have such lien, which amounted to more than the sum demanded by the defendant to be set off, satisfied in the first instance; and stating further that the plaintiff had absconded, and that the attorney had no other security for his bill than the costs and damages recovered. He contended that the practice of the Court permitting a set-off in such cases as the present was never enforced adversely to the attorney's lien if insisted upon by him; and that in justice it ought not to be extended further, as the attorney who had been at the trouble and expense of prosecuting a suit ought not to be in a worse situation because his client was liable to other demands on other accounts than those included in the suit prosecuted by such attorney. And he referred to *Mitchell* v. *Oldfield.*†

Vaughan in support of the rule said that the principle had
[*457] been laid down in the Court of Common Pleas to be that *the attorney had only a lien subject to the equitable claim against

† 2 R. R. 342.

his client; if therefore the plaintiff here could only conscientiously recover the balance as between him and the defendant, who had a cross claim upon him, the attorney ought not to stand in a better situation than his principal, and still less ought he to prejudice the rights of the defendant as against the plaintiff in the cause. And he cited *Thrustout* d. *Barnes* v. *Crafter*,* *Schoole* v. *Noble*,† and *Nunez* v. *Modigliani*,‡ as showing the practice in the Common Pleas; and *Welch* v. *Hole*,§ where this Court refused to oblige the defendant to pay the attorney's demand, the defendant having compromised his debt with the plaintiff without the attorney's knowledge.||

The COURT desired the matter to stand over for further inquiry; and on this day,

LORD KENYON, Ch. J. said:

It has been expressly determined in *Mitchell* v. *Oldfield* that the attorney had a general lien on the costs and damages recovered, without any such restriction as was now attempted to be put upon it; and that upon the reason and justice of the case he could find no ground to impose such a restriction. That whatever might be the practice in the Court of Common Pleas, he was glad to find that his opinion was warranted by the settled practice of this Court.¶

Rule discharged.

LUDWELL *v.* NEWMAN.

(6 T. R. 458—459.)

1795. *Nov.* 20.

[458]

A covenant for quiet enjoyment is broken if the covenantee is prevented from getting possession by reason of a subsisting lease.

THIS was an action of covenant on a lease for years determinable on lives granted by the defendant to the plaintiff on the 7th of November, 1788, in which the defendant covenanted that the

* 2 Blac. Rep. 826.
† 1 H. Blac. Rep. 23.
‡ Ib. 217.
§ Dougl. 238, 3rd edition.
|| *Vide* p. 200, *ante*.
¶ *Morland* v. *Rashleigh*, Tr. 35 G. III. B. R. S. P., and *Hall* v. *Ody*, 2 Bos. & Pull. 28.

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plaintiff should enjoy, &c. during the term, "without the lawful let suit trouble hindrance or denial of or by him or any other person lawfully claiming under him, &c." It was then alleged in the declaration that the term was still subsisting; and that the plaintiff was never in possession or received the rents; that on the 21st December, 1793, the plaintiff applied to the tenant in possession to attorn, and on his refusal brought an ejectment to recover possession, which was defended under a lease granted by the defendant on the 29th of September, 1788, to J. Rogers for a term commencing before the plaintiff's term; and that on the trial of that ejectment the plaintiff was prevented recovering by reason of that lease; by means of all which premises the plaintiff was prevented holding and enjoying the said premises so demised to him, &c.; contrary to the said indenture and to the defendant's covenant, &c.

The defendant pleaded that from the date of the lease granted to the plaintiff until the right of re-entry after mentioned the plaintiff might lawfully have held and enjoyed the said premises, &c. without the let suit trouble hindrance or denial of the defendant or any other person claiming under him, and that during that time no let suit trouble hindrance or denial was made or occasioned by the defendant or any other person claiming under him; that during the term, viz. 25th March, 1789, two shillings of the rent became due from the plaintiff to the defendant, and the plaintiff not paying that within 21 days afterwards the defendant became entitled to re-enter by virtue of the proviso in the lease; and that thereupon, viz. on 17th of April, 1789, the defendant did re-enter, &c.

To this plea the plaintiff demurred specially; and showed for causes that the defendant did not by his plea confess or deny the allegation in the declaration, that the term therein alleged to be [*459] granted by the defendant to the plaintiff is subsisting *and in force, but only gave an argumentative answer to it, and that the plea admitted a cause of action in the plaintiff and was no answer to the declaration, &c.

There was another count in the declaration like the first, except that it did not state the application to attorn or the proceedings in ejectment: to this there was a plea similar to the

first plea, and a special demurrer to it assigning the same causes.

Two objections were taken to the defendant's pleas; first, that no demand of rent was stated previous to the re-entry * by the defendant; and 2ndly, that the plea was no answer to the declaration; because it stated that the plaintiff might lawfully have enjoyed during the first half year of the term, when it appeared by the declaration that he could not have entered at any time on account of the prior subsisting lease granted to Rogers.

Templeman was to have argued in support of the pleas; and

Dampier for the plaintiff. But

The COURT, thinking the case extremely clear, said they would relieve the defendant's counsel from the task of endeavouring to support the pleas, which could not possibly be maintained, because they gave no answer to the plaintiff's demand. That the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which could not have taken place here on account of the prior lease granted to Rogers, and which was averred to be then subsisting. They said it was unnecessary to give any opinion on the first objection.

Per CURIAM:

Judgment for the plaintiff.

THOMPSON *v.* TAYLOR.

(6 T. R. 478—483.)

1795. *Nov.* 23

[478]

Where a ship was chartered from L. to T. there to take on board a certain number of pipes of wine and proceed to B. &c. for which the owner was to receive freight at the rate of so much per pipe, a policy of insurance on such freight was held to attach from the sailing of the ship from L.†

THIS was an action on a policy of insurance on half the freight of the ship *Nancy* valued at *l.* "at and from London

* These authorities were mentioned: Co. Lit. 201, b, 202, a; 1 Rol. Abr. 459; pl. 2, 2, 6; 5 Co. 40; 7 Co. 28, b; Freem. 242; 2 Lord Raym. 750; and 1 Salk. 259.

† Followed in *Foley* v. *United Fire, &c. Insurance Co.* (Ex. Ch. 1870), L. R. 5 C. P. 155; 39 L. J. C. P. 206.—R. C.

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to Teneriffe, at and from thence to any of the West India Islands (Jamaica excepted), and at and from thence to the bay of Honduras." The declaration, after stating the policy, &c. alleged that before the making of the policy the plaintiff by charter-party of affreightment chartered the ship to H. & S. Cox upon the voyage; in which the plaintiff covenanted that the ship "should on or before the 9th of February then next depart out of the river Thames, and directly proceed with or without convoy to Port Orotava in Teneriffe, or as near thereto as she could safely get, and after the ship should be ready to receive goods, lie 20 days and load and receive on board her from Messrs. Cox 500 pipes of wine, and then sail and proceed to Barbadoes, &c." and Messrs. Cox covenanted to pay the plaintiff for the freight and hire of the ship for the said voyage at the rate of 35*s*. per pipe, the said freight to be paid within 20 days after a certificate of the delivery of the wine. The ship sailed from London on the 9th of February, 1794, under such letting upon the said voyage described in the charter-party, and whilst she was proceeding upon the said voyage towards Teneriffe she was taken as prize; with an averment of the plaintiff's interest in half of the freight.

The defendant paid six guineas (the premium) into Court, and pleaded the general issue as to the rest.

At the trial before Lord Kenyon at Guildhall, after the plaintiff had proved his case as stated in the declaration, the defendant's counsel objected that the plaintiff could not recover because the right to freight had not commenced; but a verdict was taken for the plaintiff with liberty to the defendant to move to set it aside and enter a nonsuit; and accordingly on a former day a rule to shew cause to that effect was obtained; against which

Law and *Giles* now shewed cause:

It was taken for granted at the trial that the policy upon freight did not attach because there were no goods on board: but that proceeded upon a mistaken supposition that freight was only due upon the carriage of goods; whereas freight is [*479] another word for the *remuneration which the owner of a ship is entitled to receive at the end of the voyage for the use which has been made of his property, namely, for the

whole ship if the use of the whole ship has been contracted for, or for the carriage of particular goods if such be the contract. But in neither of these cases is the owner entitled to freight unless the voyage be completed; though after the contract is entered upon and the voyage commenced, an inchoate right commences also to freight. It is this inchoate right which is the subject matter of insurance, and which the underwriter engages shall not be defeated after its commencement by any of those perils which are described in the policy, and which would occasion the loss of the freight. In the case of goods the freight commences from the loading of the goods or part of them on board.* But where the whole ship is chartered for a certain voyage, the inchoate right to freight commences upon the same principle from the inception of the voyage, whatever use the person hiring the vessel may afterwards make of it; for she may be chartered at so much per ton ship measure, and will earn freight, although no goods be put on board. This therefore distinguishes the present case from that of *Tonge* v. *Watts*.† That was an insurance on the freight of goods, and the loss happened before the goods were on board, and consequently before the inchoate right to freight commenced. * * *

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Erskine, *Garrow*, and *Park*, *contrà*, contended that the plaintiff in this case had nothing more than a mere speculative interest, which was not the subject matter of insurance at the time; and that, the policy never having attached, he was not entitled to recover. Since the 19 Geo. II. c. 37, no person can make an insurance without having an interest in the subject matter; and this has been construed to mean an interest in the ship and on the voyage insured. Therefore, a mere speculation and future contingent interest, such as commission on the sale of goods consigned to a factor, cannot be insured. Now this was no more than a future and contingent interest; for the plaintiff would not have been entitled to freight unless the goods had been shipped at Teneriffe and carried to their port of delivery * * And again, this being an open policy the plaintiff could in that case only have recovered according to the amount of the

* *Montgomery* v. *Eggington*, 1 R. R. 718. † 2 Stra. 1251.

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goods actually on board at the time of the loss, which might have been less than the stipulated quantity; whereas now he will recover the whole sum insured. And though if less than the stipulated number of pipes had been shipped at Teneriffe the owner might have recovered damages against the freighter as for a breach of the condition of the charter-party, yet it is clear that no more freight could be recovered from him as such than the proportion due for the goods actually shipped. * * The [481] case of *Tonge* v. *Watts* * is decisive against the claim of the plaintiff. It is said that the present is distinguishable from that, because here the vessel was chartered. But there can be no difference in reason or justice whether the use of the ship be contracted for by parol or by deed. In the case referred to, there must have been an agreement by the owners to take the goods on board, for they were all lying ready to be shipped: this is in substance only such an agreement though under seal. In both cases the loss happened before the goods were actually on board but subsequent to the agreement to ship them. If then the policy on the freight did not attach in the one case, there is no reason why it should be held to attach in the other.

LORD KENYON, Ch. J.:

This case was not so fully considered or so well understood at *nisi prius* as it is now; for it was there taken for granted that every consideration respecting the ship's sailing from London to Teneriffe might be laid out of the question without prejudicing the plaintiff's right: if that were so in fact, this case could not have been distinguished from the case of *Tonge* v. *Watts;* where "as the goods were not actually on board so as to make the plaintiff's right to freight commence," it was held that the plaintiff could not recover on an insurance on the freight. But this case is clearly distinguishable from that and rests on peculiar circumstances. The property against the loss of which the assured wished to be indemnified, is that which he had a right to receive under the charter-party; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight com-

* 2 Stra. 1251.

menced. That depends on the *words of the charter-party, which are, "that the ship should on or before the 9th of February, depart out of the river Thames, and directly proceed to Port Orotava in Teneriffe, and after the ship should be ready to receive goods, lie 20 days and load and receive on board her from Messrs. Cox, 500 pipes of wine, and then sail and proceed to Barbadoes." Now it seems to me that the argument on behalf of the plaintiff is well founded, that there was an inception of this contract by the owner of the ship: for the ship did sail from the Thames towards Teneriffe, and was captured in the course of that voyage. In the case in Strange, the inception of the contract would have been the taking of the goods on board; but as the loss happened before the goods were put on board, there was no inception of the contract, and the plaintiff was nonsuited. But in the case of *Montgomery* v. *Eggington*, there was an inception of the contract, because part of the goods had been put on board; and the party there recovered on an insurance on freight. So here as the plaintiff had begun to perform his part of the contract, as he had done something under it, which if matured would have entitled him to his freight, I think he may recover on this policy which was an insurance on that freight. His contract under the charter-party was entire, and we cannot divide it; the ship was to sail from hence to Teneriffe, where she was to take wine on board and carry it to the West Indies; he was to receive freight for the whole voyage; and the plaintiff had performed part of the contract. Therefore on the principle on which the case in Strange was decided, though the circumstances of that case are different from those in the present, I am of opinion that the plaintiff is entitled to recover.

GROSE, J.:

The question is, Whether the plaintiff's right to freight had commenced, according to the expression used in the case in Strange; for if it had, he has a right to recover on the policy. And it seems to me that that right commenced by the sailing of the ship from the Thames on the voyage described in the charter-party. The ship had begun the voyage, which had it been completed would have entitled the plaintiff to freight; but the ship

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was taken during the voyage; by which the plaintiff loses his freight, and for that loss he calls upon the underwriter on his contract of indemnity. In *Tonge* v. *Watts*, the right to freight had not commenced, because the goods were not on board. But

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*here the right to freight was to commence before the goods were taken on board at Teneriffe, namely, by her sailing from this country to Teneriffe in the course of her voyage. It was said that this was not an insurable interest, because the plaintiff had neither an interest in the ship or in the voyage insured: but the fact is otherwise; for, though the goods were not on board the ship, the plaintiff had an interest in the voyage; he had begun to do that for which he would have been entitled to a recompense under the charter-party if he could have completed it.

LAWRENCE, J.:

It seems to me that the plaintiff clearly had an insurable interest. As to the objection that this was only a speculative interest; this is not unlike a case † which happened a few years ago, where it was held that the profits of a cargo of molasses might be insured notwithstanding the statute 19 Geo. II. c. 37. In the case of *Tonge* v. *Watts*, the plaintiff was nonsuited because his right to freight had not commenced; from which it is to be collected that if that right had commenced, he would have been entitled to recover; now here the plaintiff's argument on that point is conclusive, there was an inchoate right to freight the instant the ship sailed from the Thames. And as the plaintiff was prevented completing his contract by one of the perils insured against, he is entitled to recover against the underwriter on the policy on the freight.

Rule discharged.

† *Vid. Grant* v. *Parkinson*, Park on Insur. 305.

SADGROVE *v.* KIRBY AND ANOTHER.

(6 T. R. 483—488.)

1795. *Nov.* 24.

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KIRBY *v.* SADGROVE, IN ERROR.

(1 B. & P. 13.)

A commoner cannot justify cutting down trees planted by the lord on the waste, although there be not a sufficiency of common left, but his remedy is by action on the case or by assize.

TRESPASS for cutting down the trees of the plaintiff growing in the parish of South Moreton in the county of Berks. [The points of the case, which was argued upon the pleadings, sufficiently appear from the judgments.]

LORD KENYON, Ch. J.: [485]

After examining all the cases, and especially that of *Cooper* v. *Marshall*,† in which most of the authorities on the subject were attentively considered, I am of opinion that the justification set up by the commoner in this case cannot be supported. The distinction seems to be this; if the lord of the manor make a hedge round the common or do any other act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common: but if the commoner can get at the common and enjoy it to a certain *extent, [*486] and his right be merely abridged by the act of the lord, in that case his remedy is by an action on the case or by an assize, and he cannot assert his right by any act of his own. Here the trees had become part of the inheritance, and according to some of the cases a commoner cannot touch the soil. And though the passages cited from *Bridgman* appear only to have been said by him in the argument of that case, it is well known that *Bridgman* was a counsel of considerable eminence, and what he said seems warranted by other decisions. In questions of difficulty and nicety Lord Coke says that arguments *ab inconvenienti* ought to have great weight. Now in this case there is no measure between the convenience of the decision on one side and the other. If the lord plant trees, it is to the advantage of the community; but if the commoner say that by that act his right is abridged, in

† 1 Burr. 259, and 2 Wils. 51.

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what mode is it most convenient to try that question? Surely it is more convenient to decide it in an action before the trees are cut down and destroyed than afterwards. I am not able to distinguish this case from that of *Cooper* v. *Marshall:* In that case the rabbits occasioned an injury to the right of common; but the Court said that the commoner could not touch the soil, that if the lord had done more than he had a right to do, the commoner must bring an action against him for it; DENISON, J. said he ought not to be a judge in his own case. *Bridgman* 11, is to the same effect. Therefore on the best authorities on this subject, and on the convenience of the case, which ought to turn the scale when there are contradictory cases, I am of opinion that the plaintiff is entitled to judgment. With regard to the case cited from 2 Mod. on behalf of the plaintiff; it is a short loose note; and it does not clearly appear that the defendant in that case did more than make a gap in the hedges in order to let his cattle into the common.

ASHHURST, J.:

The lord of a manor may do any act on the common, provided he do not contravene the rights of the commoners, therefore *primâ facie* he has a right to plant trees there; by the Statute of Merton he may approve against his commoners, leaving sufficiency of common; and such an act does seem *primâ facie* to contravene the rights of the commoners. If he may enclose, *à fortiori* he may plant trees on the common; but if he do either of these acts to excess, and do not leave a sufficiency, the commoners may [*487] bring an action against him: But in order to maintain *such an action against the lord, the commoner must shew that there was not a sufficiency of common left. Planting trees may be a benefit to the common, they may afford shelter to the cattle there; and it will be taken for granted that the lord may plant trees, until the commoner shews that such planting prevents his enjoying his right of common in so ample and beneficial a manner as he is entitled to. And this decision is most convenient to the public: it is better that the commoner should bring an action on the case against the lord for this supposed injury to his right than that he should become the judge in his own cause and abate the nuisance himself.

GROSE, J.:

This case is not essentially different from that of *Cooper* v. *Marshall*. The commoner does not say in his justification that the trees totally excluded him from the common, but merely that they prevented his enjoying his common in so ample and beneficial a manner as he ought. In *Cooper* v. *Marshall* Lord MANSFIELD recognized the distinction between those nuisances that the commoner may, and those he may not, abate; he said that a commoner may abate a nuisance that prevents his enjoying the right of common at all, as in the case in 2 Mod. 65, but not such a nuisance as merely prevents his enjoying it in so beneficial a manner as he is entitled to. The case in 2 Modern was decided on the authority of a case, 29 Ed. III. 6. And on looking into the year books it appears that the commoners justified abating the hedges, because they prevented their cattle going upon the common. But that is not pretended in this case; for though the trees were standing on the common, there was some common left; and if a commoner complain that there was not a sufficiency of common left, it is reasonable that he should not cut down the trees, but should bring his action against the lord for abridging his right.

LAWRENCE, J.:

The argument *ab inconvenienti* is exceedingly strong in favour of the plaintiff. The only case that at first weighed with me against this decision is that *in 2 Modern: but the case in the [*488] year books, on which that case proceeded, explains it, and makes it consistent with all the other authorities.

Judgment for the plaintiff.

[This decision was affirmed in the Exchequer Chamber, and is reported under the name of *Kirby* v. *Sadgrove*, 1 B. & P. 13. The judgment was delivered by EYRE, C.J., without hearing counsel for the defendant; and was to the effect that the case of *Cooper* v. *Marshall* was decisive.]

K. B. HILARY TERM.

1796. *Jan.* 26.

[512]

DENN, ON THE DEMISE OF RADCLYFFE, *v.* BAGSHAW AND OTHERS.

(6 T. R. 512—522.)

Devise to Margaret (an only child) for life, remainder to the first son of her body "if living at the time of her death" and the heirs male of such son, and for default of such issue to the second son of her body "if living at the time of her death," and the heirs male of such second son, &c.; and for default of such issue male, remainder to A.; Margaret had one son, who died in her lifetime leaving a son; held that Margaret only took an estate for life, and that neither her son or grandson took any estate, but that the remainder to A. took effect.

EJECTMENT for two messuages and land in the parish of Hope in the county of Derby. At the trial a case was reserved, stating that Adam Bagshaw, being seised in fee of the premises in question together with other estates, by will dated 4th May, 1729, duly attested, devised unto his nephew Richard Bagshaw, eldest son of his brother R. B., and the heirs male of his body, all his houses, lands, &c. in W., &c., and for default of such issue of his body to William Bagshaw the second son of his brother and the heirs male of his body; and for default of such issue to J. B. the third son of his brother and the heirs male of his body; and for default of such issue to the right heirs of the devisor. He then devised unto his daughter Margaret Bagshaw all his estate, lands, tenements and premises called Blake Edge, in the parish of Hope in the county of Derby (being the premises in question) for and during the term of her natural life, and from and immediately after her decease to the first son of her body if living at the time of her death, and the heirs male of such first son; and for default of such issue to the second son of her body if living at the time of her decease, and the heirs male of such second son; and so to the third, fourth, &c. and every other son and sons of the body of the said Margaret, and their heirs male, as they should severally and respectively follow in seniority of age and

priority of birth; and for default of such issue male, to his said nephew Richard Bagshaw, and the heirs male of his body; and for default of such issue to his said nephew William and the heirs male of his body; and for default of such issue to his said nephew John and the heirs male of his body; and for default of such issue to his own right heirs. The devisor died on the 24th May, 1729, and Margaret Bagshaw his only daughter and heir at law entered on the premises in question. Margaret Bagshaw, in June, 1737, married Robert Radclyffe the grandfather of the lessor of the plaintiff. They had issue one son, the father of the lessor of the plaintiff, which son died in the life-time of the said Margaret in December, 1783; Robert Radclyffe the grandfather having died in 1749. Richard and William Bagshaw two of the devisor's nephews mentioned in the will both died without issue in the life-time of Margaret Radclyffe; and she also died *in [*513] November, 1786. At the time of the death the lessor of the plaintiff was an infant; and John Bagshaw the other nephew of the devisor named in the will entered and possessed himself of the premises in question; in Hilary Term, 1787, he suffered a recovery thereof, and died in 1792; and under him the present defendants claim. The lessor of the plaintiff is the heir at law of Margaret Radclyffe and of the devisor, and came of age in December, 1794.

Vaughan for the plaintiff:

* * It clearly appears from the devisor's situation with respect to his family, and from the whole of his will, that his general intent was that the limitation over to his nephews should never take effect until all the male descendants of his daughter were extinct. Now that intention may be effected either, 1st, By converting the life-estate of the daughter into an estate-tail; or 2ndly, By construing the limitation to the first son of Margaret to be an estate-tail, vesting when he came *in esse* and liable to be divested by his dying in the lifetime of Margaret without leaving issue male. 1st, If it be objected to the first construction that hereby the estate of the first taker will be enlarged against the express intent of the devisor; it may be answered that it has often been done to further his general intent, even where he has

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used express negative words; as in *Robinson* v. *Robinson*,† where the devise was to L. H. for his life and no longer; yet he was held to take an estate-tail in order to effectuate the general intent of the devisor. Besides, the mere circumstance of not excluding grand-children by the construction to be put on the words of the will has been of great weight in many cases; that alone operated in *Wyld* v. *Lewis*‡ to enlarge the estate of the first taker from an estate for life into an estate-tail. Lord HALE decided on the same ground in *King* v. *Melling*§. In *Denn* v. *Puckey*,‖ though there was an express devise for life, and without impeachment of waste, yet in order to execute the general intent the Court held that the first taker took an estate-tail. And the case of *Roe* v. *Grew*¶ was there relied *on, in which the principle now contended for was fully established, that where two contrary intents appear on the face of the will, both of which cannot have effect, the Court will prefer the principal or more general intent to the other which is secondary and inferior. * * This principle was carried to a much greater extent in *Doe* v. *Applin*;†† for that being a devise to A. for life, and after his decease to and amongst his issue, and in default of issue then over, the Court were obliged to reject the words "and amongst," by which the estate of the younger children was defeated, in order to give A. an estate-tail; there being no other way of effectuating the general intent, which was that the estate should not go over to those in remainder till after a general failure of A.'s issue. Or 2ndly, The first son of Margaret may be construed to take an estate-tail subject to be defeated by his dying in the life-time of his mother without leaving issue male. The only words which create the difficulty in this mode of construction are "if living at the time of her death." But those or similar words do not create a condition, but merely mark the period when the remainder should commence in possession, as was held in *Webb* v. *Herring*,‡‡ *Badger* v. *Lloyd*,§§ and in many other cases collected by Fearne.‖‖ But even

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† 1 Burr. 38.
‡ 1 Atk. 432.
§ 1 Ventr. 225, 230.
‖ 2 R. R. 602.
¶ 2 Wils. 322.
†† 2 R. R. 337.
‡‡ Cro. Jac. 415.
§§ 1 Ld. Raym. 523.
‖‖ 1 Fearne, 367, &c.

in the case of conditions, words which make a condition precedent in a deed have often been held to make only a condition subsequent in a will; and this has been so held where the word "if," as here, was made use of; *Edwards* v. *Hammond*.† Now if the estate-tail vested in the son, the Court will not divest it again so long as he has issue male, contrary to the plain intent of the devisor. To this the case of *Spalding* v. *Spalding*‡ is directly in point. There J. S. having three sons, J., T., and W., devised to J. and the heirs of his body, after the death of Alice, the devisor's wife; and if J. died, living Alice, that W. should be his heir: J. died, having a son, in the life-time of Alice; *then Alice [*515] died, and W. entered on the son of J.: The Court held unanimously that upon the whole context of the will the true intent and construction appeared to be that if J. died without issue, living Alice, then W. the youngest son should have it. All these cases proceed upon the ground that there is as much reason for preferring the issue of the issue as the first issue. But supposing this to be a condition precedent or conditional limitation, yet there being no express limitation over to take effect on the breach of it, none can be implied, according to *Gulliver* v. *Ashby*,§ unless to effectuate the general intent; and here the intention is against such an implication. The limitation over in this case to the nephews is for default of such issue male, the precedent limitation being to the first and other sons of Margaret and their heirs male; the limitation over therefore could not take effect so long as there were any heirs male of such sons. The consequence would be that though the lessor of the plaintiff would take nothing under the will, yet he would come in as heir at law. *King* v. *Melling*,‖ and *Evans* v. *Astley*.¶

Perceval, contrà, contended that Margaret took only an estate for life, and that the remainder to her son was upon a contingency which never happened, namely his surviving his mother. * * *

† 1 Lev. 132, and 1 Fearne, 372, 4.
‡ Cro. Car. 185.
§ Burr. 1943.
‖ 1 Ventr. 225.
¶ 3 Burr. 1570, 1582.

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LORD KENYON, Ch. J. (after stating the case):

The question is whether in the event that has happened of death of the father of the lessor of the plaintiff in the life-time of his mother Margaret, the lessor of the plaintiff can make a good title to the premises in question. I confess this seems to me to be one of those cases in which I find my wishes in opposition to what I am bound judicially to decide. If I could make, instead of construing, this will, I should say that the nephews of the devisor are so amply provided for in the former part of this will that they ought not to insist on disinheriting the heir-at-law, which they will do by enforcing this will: but I am not at liberty to indulge my wishes upon the subject. We must consider this case in the same light as if the son of Margaret had attained the age of twenty-one in his mother's life-time, and had joined with his mother in suffering a recovery; the defendant's counsel has shewn the inconvenience of determining that the construction contended for by the plaintiff ought to prevail, for then the intention of the devisor would have been wholly defeated. All the cases cited on behalf of the plaintiff proceeded, not on the formal and technical words, but on informal words in the wills, where the Court were left to collect the intention of the devisor as well as they could from the different parts of the wills: whereas here correct and technical expressions are used throughout; and no lawyer could have introduced more formal words in the limitations in this will than the devisor has used. In addition to the cases cited by the plaintiff's counsel, another, and that a very strong one, might have been mentioned by him; [*517] *Fuller* v. *Fuller*, Cro. Eliz. 423, *where POPHAM, J. said, if an estate be given to A. and the heirs of his body, and A. die in the life-time of the devisor, the heir should take as a purchaser. But that point was well considered in the last case that came by writ of error from Ireland, *White* d. *White* v. *Warner*,† when all the judges were of opinion that it was impossible to support such a position; that where the devisor intended that one should take under the will by purchase and another by descent from him the order could not be reversed, and that if the former died in the life-time of the devisor the latter could not take as a pur-

† Dougl. 344, n. [4], 3rd edit.

chaser; and in that case the remainder over took effect to the exclusion of the issue of the first devisee. So in the case of *Hodgson* v. *Ambrose*; * where Lord MANSFIELD said, "The words 'and for want of such issue' mean the same thing as 'and after such estate tail;' and this is the common case of a remainder after an estate tail, where, if the first estate never take place, the remainder vests in possession immediately." If by accident the person, who was to take as tenant in tail under a will, die in the life-time of the devisor, the remainder over takes place immediately. Therefore, in opposition to our wishes, but in conformity with all the cases upon the subject, for in all the cases in which a different construction has been put, informal words were used, and that construction was adopted in order to effectuate the intention of the devisor as collected from the will itself, I am of opinion that the lessor of the plaintiff is not entitled to recover.

ASHHURST, J.:

I am sorry to be obliged to give the same opinion: but the devisor has expressed himself in strong and technical language. The son of Margaret could only take in the event of his surviving his mother. If the event of Margaret's son dying in the life-time of his mother leaving issue had occurred to the devisor, most probably he would have provided for it.

GROSE, J.:

The intention of the devisor is so plainly expressed and in such plain words that if we were to determine in favour of the plaintiff we should make a will for the devisor.

LAWRENCE, J.:

I entirely concur in the opinion that has been given, and will only state what passed in this Court in the case of *Warner* v. *White*. [Mr. J. LAWRENCE here read the opinion given by Lord MANSFIELD in this case:

"*Hamilton White* v. *Warner* lessee of Richard White, B. R. Mich. 22 Geo. III. Error from the King's Bench in Ireland on

* Dougl. 340.

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a *judgment in ejectment on a special verdict; stating that Richard White being seised of the manor of Bantry and of other lands in the county of Cork, on the marriage of his eldest son with J. Eyre, by indenture dated 24th September, 1766, made between himself, Simon White his eldest son, and other persons, made a settlement as to part of the said lands on his said son for life, remainder to his first and every other son in tail on the body of his then wife to be begotten, remainder to his son in tail male, remainder to the right heirs of the settlor. As to other lands, they were settled on Simon in tail male, with a provision that the settlor and his heirs should enjoy the royalties of the manor of Bantry, and that Simon should do suit and service for the settled lands at the manor court of Bantry. Simon entered on the settled lands and became seised thereof as the law requires. Richard being seised in fee of other lands parcel of the manor of Bantry, and of the reversion of the settled lands, and of lands in the barony of Carbery in the county of Cork, and having issue the said Simon, and Hamilton White, the plaintiff in error, his second son, and a daughter married to Richard Longfield, Esq. and no other issue, on the 1st January, 1775, made his will, and thereby recommended it to such of his children as should enjoy his estate at Bantry to cause a vault to be made in the chancel of the church there for a burial-place for his family. He then gave his daughter 100 guineas for mourning, having given her on her marriage 7,000*l.*, which he recited to be the full fortune intended for her provision. He then gave to his grandson Richard White (the defendant in error) his undivided third part of certain lands in tail, the whole amounting to about 160*l.* per annum, the rents to be paid him by his son and executor Simon from his age of sixteen years; and in case he should die before twenty-one without issue, then to his grandson Simon White, and in like manner to his grandson Richard, and in like manner to his grandson Hamilton White, and in like manner to his grandson E. White, and in case of his dying without issue to his own right heirs; and in like manner he gave other estates to his grandsons. He then gave to his youngest son Hamilton White and his heirs male his estate in the manor of Carbery; and in default of such issue, he gave it to his eldest

son Simon White and the heirs of his body, and in default of such issue to his daughter M. Longfield for life, remainder to her first and every other son in tail. He also gave to Hamilton White for his life some *lands parcel of the manor of Bantry, of which he was in possession, paying thereout to Simon his executor 5*l.* per annum. 'All the rest and residue of his estate in Bantry not settled on his eldest son Simon's marriage, and not thereby devised to his son Hamilton, and all his right title and interest in the manor towns and lands of Bantry, with all the appurtenances thereof, together with all remainders and reversions of the settled lands, he gave to his eldest son Simon White and the heirs of his body lawfully begotten; and for default of issue of his said son Simon, he devised his said entire estate at Bantry to his son Hamilton White and the heirs of his body lawfully begotten, and for default of issue of Hamilton, then he devised his entire estate of Bantry to his daughter M. Longfield for life, and after her decease to the heirs of her body lawfully begotten, remainder to his own right heirs.' Simon White died 2nd September, 1776, leaving issue of his said wife J. Eyre Richard White, (the defendant in error) and three other sons and one daughter; the devisor knew of his death; and he had been a barrister at law. He died on the 27th September, 1776, Hamilton White being then unmarried and about thirty-five years of age. The settled lands amounted to about 1,008*l.*; the lands in dispute to 2,300*l.*; the lands left to Hamilton White the son for his life to 70*l.* per annum; and the testator gave him by his will 1,000*l.*

"The Court of King's Bench in Ireland gave judgment for defendant in error, which was reversed here after two arguments.

"Lord MANSFIELD, Ch. J. having stated the case, said the Court of K. B. in Ireland having determined for the defendant in error must have gone on a ground something of this sort; that it is to be implied though not expressed in the will that the devisor meant to provide for the contingency of his son's dying in his life-time, giving the estate to his children on such contingency as purchasers. For when any of the other ways are considered it will appear utterly impossible to support them. Our

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wish is to support the plaintiff below, and I have endeavoured to distinguish this out of the reason and letter of the authorities. For no one can doubt that the intent of the devisor is otherwise defeated. This will was intended as a continuation of a family settlement on the marriage of the devisor's eldest son; and it is impossible to suppose he had an idea that the issue of his eldest son could be set aside for his second son. If this matter had been taken up as *res integra*, the intention of the devisor might [*520] have *had weight: but this is in a matter of real property, and the point is so well settled, and the letter and reason of the authorities are so clear, that it is impossible to shake them even if they were more erroneous than any one can suppose them to be. The case of the devisee's dying before the devisor happens every day; and many titles depend upon it. It is proper therefore to see what is the established law.

"Lands at common law were not devisable; and though they were devisable in some places by custom, yet very little is to be found as to devises of lands in the books before the statute of Wills. But in personal bequests it is settled, that if a man give to a legatee, as the will does not speak till the testator's death, if the object of his bounty die in his life-time, the bequest is lapsed; for none can claim in his right who had nothing himself; and there must be a person *in esse* in whom it may vest. *Brett* v. *Rigden* † is the first case after the statute of Wills; that was a devise to A. and his heirs: the Court held this lapsed by the death of A. in the life-time of the devisor, because the heir was no object of the devisor's bounty: and this was only a mode of giving a fee to the principal; the word heir only denoting the quantity of the estate. *Hartop's* case ‡ was the next; this was an estate-tail with remainders over; originally perhaps a distinction might have been made between that and the former case. In case of a devise in fee the heir can be no object; but in the case of an estate-tail he claims *per formam doni*, and the issue is part of the object of the devisor's bounty. But the authorities put them on the same footing; and the reason is material to attend to, because every man claiming under a will must claim as a purchaser; and unless he take it, his heir

† Plowd. 345. ‡ Cro. Eliz. 243.

cannot. It is admitted that if this had been a devise to a stranger, this would have been the law. But a distinction is contended for where the devise is to the heir at law in tail, with a remainder over, and a devise to a stranger; and that there is no case where the devise has been to the heir at law. I doubt this; for *Hutton* v. *Simpson* † seems the case of an heir at law; and there is no distinction between an heir and coheirs; both being disinherited. In *Packman* v. *Cole*, 2 Sid. 53, 78, and in *Ambrose* v. *Hodgson*, there was an heir. But if this distinction were admitted, how is the heir to take? If the implication be this, that so long as A. has issue B. shall not take; this holds in the case of a stranger: and there is an end of the heirship if he take by the will. *So if it be this, that nothing shall go to the [*521] second devisee until failure of issue of A., but that the estate shall descend to the heir at law *quousque*, this will hold equally if the devisee be a stranger. The last ground, and perhaps the best, is that the event overturns the whole will, and that the heir shall take, not being disinherited by express words. But this is begging the question: for he is disinherited by the express words of the will; by giving Simon only a qualified estate, it is saying he shall take nothing by descent. It is therefore impossible to get over the letter or reason of the authorities, or to make any distinction in favour of the heir. The dictum of POPHAM ‡ is extrajudicial; and he puts it in a way not supported by the counsel here, for he would have none of the sons disinherited. And there is another saying of his there which is palpably wrong, as to a devise to a dead man and his heirs, that the land shall go to his heirs. Upon every ground therefore the judgment must be reversed.

"WILLIS, J. and ASHHURST, J. declared themselves of the same opinion.

"BULLER, J.:

"The event in this case was not provided for. In *Goodwright* v. *Wright* it was fully settled that the words "heirs," &c. are a description of the estate of the first taker. I am inclined to

† 2 Vern. 722. ‡ In *Fuller* v. *Fuller*, Cro. Eliz. 423.

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think *Hartop's* case that of an heir at law; he was a brother: nor do I think the *melius inquirendum* was on the ground suggested; for if there were any distinction between the heir and a stranger, the Court could not have given the judgment they did without first knowing whether he was actually heir. As to POPHAM's opinion, it was not intended to be confirmed by Lord MACCLESFIELD in *Goodwright* v. *Wright*; † for he says it is mistaken in express words; and it was only mentioned to shew that allowing that dictum it did not apply to the case then before the Court; besides so material a distinction is not even noticed in Pr. Williams.

"There does not appear on the face of the will an intent not to disinherit the heir at law; for by the will the remainder-man is preferred to the issue of the first taker. As to implication, it is a difficult thing to imply a devise, where there is an express one to the contrary, and the thing not within the contemplation of the devisor. Nor is the will to be altered by the event. But the rule of law is that if any part of a will can take effect, it shall; here the remainder may: but according to the construction put on the case for the defendant no part can. I doubt whether the [*522] case put at the *bar is correct; for a devise on failure of issue and not till then would still be a remainder and take effect immediately if the prior devise were removed.

"*Judgment of K. B. in Ireland reversed.*" ‡]

† 1 Stra. 25; 1 P. Wms. 397.

‡ The judgment of this Court was afterwards affirmed in Dom. Proc. May 6th, 1782.

THE KING *v.* WILLIAM STONE.

(6 T. R. 527—531.)

1796. *Jan.* 28. 29.

[527]

Indictment for high treason in compassing the King's death and adhering to his enemies. Overt act, conspiring with others to send intelligence to the enemy concerning the disposition of the King's subjects in case of an invasion.

A letter sent by one of the conspirators in pursuance of the common design with a view of reaching the enemy, evidence against all engaged in the same conspiracy.

A paper found in the possession of one of the conspirators containing intelligence proved to have been collected by the prisoner, which paper was in the handwriting of the prisoner's clerk, evidence against the prisoner: *aliter* of a paper in the same handwriting not appearing to have any connection with the prisoner.

Any intelligence sent to the enemy in order to serve them in shaping their attack or defence though the purport of it may be to dissuade them from an invasion is high treason.

One disturbing the Court fined.

Power of the Court to adjourn in criminal cases where necessary for the ends of justice.

Description of jurors.

THE prisoner was tried at the bar of this Court on the 28th and 29th days of January, in this term upon an indictment for high treason on two branches of the 25 Ed. III. st. 5, c. 2, for compassing the death of the King, and for adhering to his enemies. The overt acts were the same in each count, being eleven in number; but that to which the evidence chiefly applied was the conspiring with John Hurford Stone, William Jackson and others unknown to collect intelligence within this kingdom and the kingdom of Ireland of the disposition of the king's subjects in case of an invasion of Great Britain or Ireland, and to communicate such intelligence to the persons exercising the powers of government in France, enemies of our lord the king, for their aid, assistance, direction, and instruction, in their conduct and prosecution of the war, &c.

Evidence having been given to connect the prisoner with John Hurford Stone who was during the transaction resident in France and domiciled there and Jackson,* and to shew that they were engaged in a conspiracy for the above stated purpose; Lord

* Who was occasionally in England, Ireland, and abroad, but generally in Ireland.

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Grenville the Secretary of State for the foreign department was called to prove that a letter of Jackson's containing treasonable information had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated.

Adair, Serjt. and *Erskine* objected, on behalf of the prisoner to the reading of this letter as it had not been proved to have [*528] *come to the hands or knowledge of the prisoner; and insisted that nothing could be received to affect the prisoner but his own acts.

The *Attorney-General* answered that, as the overt act charged was a conspiracy of which proof was before the Court, the act of each conspirator in the prosecution of such conspiracy was evidence against all: that it had been so determined by BULLER J. in the case of *The King* v. *Bowes*, 30th May, 1787, who were convicted for a conspiracy to carry away Lady Strathmore; and that the same principle had been also settled in *The King* v. *Hardy*, and *The King* v. *Tooke*, at the Old Bailey in 1794. And that where several were engaged in the same design, nothing was more common than to receive the acts of one against another, though not present; as in the cases of murder and burglary, the acts of him who actually killed the person or broke open the house were evidence against those who at a distance were employed watching to guard against any interruption.

Lord KENYON, Ch. J. said he had no doubt but that there was sufficient evidence to connect Jackson and the prisoner: but that as to the evidence now offered he should have great doubts of its admissibility, if it had not been sanctioned by the respectable authority of the judges who sat upon the late trials for treason at the Old Bailey; the determination of that Court however had great weight with him; and the instances of murder and burglary alluded to went a great way to remove his doubts. That scruples in a case of blood might induce a doubt, when on further consideration there would be no doubt.

ASHHURST, J. thought the evidence admissible.

GROSE, J.

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If a number of persons meet towards one common end, the act of each is evidence against all concerned.

LAWRENCE, J. said that in *Tooke's* case he had alluded to the cases of *Lord Stafford* and *Lord Lovatt* to shew that in order to prove a conspiracy the acts of the different conspirators as connected with and in conformity with his own were admissible evidence, though acts to which the prisoner was no direct party,* and that in this case evidence having been given sufficient for the jury to consider whether the prisoner was not one engaged in a conspiracy for treasonable purposes with Jackson, if they were of that opinion, Jackson's acts done in pursuance of that conspiracy were in contemplation of law the acts of the prisoner.

The evidence was received. This was on the first day of the trial. [529]

Lord KENYON, Ch. J. the next morning said he had thought of the point, and was satisfied it had been rightly decided by the Court.

A paper was read in evidence found in the possession of Jackson in the hand-writing of one Galliers a clerk of the prisoner, which was at first opposed, but afterwards agreed by the prisoner's counsel to be evidence when they found that it contained parts of certain papers which (it had been proved before) the prisoner had obtained from two gentlemen of the names of Vaughan and Smith. But another paper so found in the possession of Jackson, which was also in the hand-writing of Galliers, was not allowed to be read as a paper sent by the prisoner to Jackson; for Galliers might have been called to prove the fact of writing it by the prisoner's direction; which, as there was nothing in the body of it to shew it came from the prisoner, differed it, in this respect, from the other paper.†

LAWRENCE, J. observed that the only ground to offer it, as

* *Vide Rex* v. *Cope* and others, 1 Stra. 144.

† What the nature or contents of this paper were did not appear.

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written by the prisoner's direction, was the circumstance of its having been proved that the first paper was so written: but it did not follow because the prisoner had employed his clerk Galliers to write one paper, he had therefore employed him to write another.

For the prisoner it was contended, that papers containing a state of the disposition of the subjects of this country in case of an invasion, which the prisoner had obtained from Vaughan and Smith, and had sent to Jackson in Ireland, were so procured and sent with a good intent, namely, that of preventing an invasion.

Lord KENYON, Ch. J., in summing up the evidence to the jury said that the Statute of Treasons had delineated that crime in plain terms, or at least in terms of which the construction had been uniform. That two species of treason had been imputed to the prisoner; and it was admitted that the evidence offered was advancing to charge him with both species of that offence. On such a law he should be sorry to find shifting opinions. But it would be sufficient to call their attention to the second count. He then stated in the words of Lord MANSFIELD in *Rex* v. *Henzey*,† that letters of advice and correspondence and intelligence to the enemy to enable them to annoy us or defend themselves, written and sent in order to be delivered to the [*530] enemy, are, though intercepted, *overt acts of both these species of treason. He then drew the attention of the jury to that which he considered as the important evidence in the case: and stated the papers he had got from Vaughan and Smith; and then told them they must consider whether those letters contained information, which if given to the French would be of use to them in their future conduct. That it had been argued for the prisoner as if the criminality of such papers had rested on an invitation to the French to invade this country; but that nothing like it was the point of the cause. If according to Lord MANSFIELD the communication was likely to be of use to the French to enable them to annoy us, defend themselves or shape their attacks, sending such a paper with a view of its going to the enemy was

† 1 Burr. 642.

undoubtedly high treason. That it had been said for him that he did not mean to assist the councils of France, but to avert an invasion of this country: but it was for them to say whether he sent them innocently after what they had heard.

After the jury had retired for two hours and three quarters, they returned at eleven o'clock on the second night, and found the prisoner not guilty. On this there was a considerable shout in the Hall; and a man of the name of Thompson jumping up in the middle of the Court waving his hat and hallooing was taken into custody and fined 20*l.*

The Court having sat on the first day of the trial from nine o'clock in the morning till ten o'clock at night without any interruption or refreshment, and the *Attorney-General* stating that his evidence would occupy four hours more, and some of the jury being very much exhausted and incapable as they declared of keeping up their attention much longer, the Court adjourned till nine o'clock the next morning; Lord KENYON observing that necessity justified what it compelled. And that though it was left to modern times to bring forward cases of such extraordinary length,† yet no rule could compel the Court to continue longer sitting than their natural power would enable them to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well * and truly to keep the jury and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to this trial." [*531]

The entry of the adjournment was in this form;

Thursday next after fifteen days of Saint Hilary in the 36th year, &c. Forasmuch as it appears to the Court here from the length of time which has been already occupied by the trial of the issue joined upon this indictment and the further time which

† At the Old Bailey the latter end of 1794, the trials of various persons for high treason lasted—Hardy's trial nine days, Horne Tooke's trial six days, Thelwall's trial four days. On the first of these trials the adjournment was stated to be made by the consent of the prisoner: but on the second the judges who sat having in the meantime conferred with the rest of their brethren said they were clearly of opinion it might and ought to be done by the authority of the Court without calling on the prisoner for any consent.

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will be necessarily occupied by the same that justice cannot be done if this Court proceed without intermission upon the said trial; it is ordered that the jury impanneled and sworn to try the said issue have leave to withdraw from the bar of this Court, being well and truly kept by six bailiffs duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue; and that the same jury shall again come to the bar of this Court on the morrow at nine o'clock in the forenoon. And it is further ordered that the prisoner be again brought to the bar of this Court at that time. BY THE COURT.

The prisoner was allowed occasionally to sit.

None were sworn on the jury who had not a freehold in the county, or who were above 70 years old. The prisoner's counsel objected to one of them, as being ill described; his place of abode being stated to be Grafton street, and as it was said, there being several of that name, there should have been something added to distinguish which Grafton street was meant. This objection was over-ruled; whereupon the prisoner challenged the juryman peremptorily.

1796. *Feb.* 1.

[531]

BEATSON *v.* HAWORTH.

(6 T. R. 531—534.)

If the voyage described in a policy be "from A. to B. and C.," and the ship go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any subsequent loss, if it be not the regular and settled course of the voyage to go to C. first. And *Qu.* whether such a regular and settled course of voyage will control such a policy?

THIS was an action on a policy on the ship *Bazil* "at and from Fisherrow to Gothenburgh, and back to Leith and Cockenzie;" valued at 500*l.* without further account to be given. At the trial before Lord Kenyon at Guildhall it appeared that the ship performed her voyage outward to Gothenburgh, and having taken in goods both for Leith and Cockenzie in her return home in the spring of 1787 without going to Leith first put into Cockenzie where she was stranded and lost. It was given in evidence that

Leith was a very safe and commodious harbour, and Cockenzie a very small and insecure * one, especially in the winter season. That the two places are about ten miles apart from each other; but Cockenzie lies nearer to Gothenburgh than Leith, and it is about a mile and a half out of the way to put into Cockenzie in going from Gothenburgh to Leith. There did not appear to be any settled course of trade to regulate the track of the voyage in this respect; though the weight of the evidence was in favour of going first to Leith in point of prudence, owing to the insecurity of the harbour of Cockenzie in general; for by discharging the lading for Leith there in the first instance, the risk of going into the harbour of Cockenzie was thereby much lessened. Two objections were made at the trial on the part of the defendant, 1st, That as the ship went into Cockenzie before she went to Leith, it was a deviation from the voyage described in the policy, which was to Leith and Cockenzie. 2ndly, That this was a gaming policy within the statute 19 Geo. II. c. 37, being without proof of interest. Both points were reserved; but the decision went wholly on the first. A verdict was agreed to be taken for the plaintiff, without prejudice to the defendant, subject to the opinion of the Court upon the points of law; with liberty to the defendant to move to enter a nonsuit. A rule to that effect having been obtained,

Gibbs now shewed cause against it; saying, that it had never been held necessary, where two ports of discharge are named in a policy for the ship to go first to that which happens to be named first in the policy. Every underwriter must be taken to be cognizant of the nature of the voyage which he insures, and of the course of trade which prevails in it. He must be taken to know the relative situations of the several places from and to which the vessel is insured; therefore here the defendant must have known that Cockenzie lay between Gothenburgh and Leith, and that the vessel would naturally touch at Cockenzie first, there being no course of trade to regulate her voyage otherwise; that being the shortest and most convenient track. Where a particular track is intended to be chalked out by the underwriter, the usual form of describing it is from A. to B. and from B. to C. The

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general mode of expression therefore adopted in this case, from A. to B. and C., shews that it was intended to leave it to the discretion of the captain; and this is confirmed by the circumstance of there being no particular usage, but sometimes the one and sometimes the other is the first port of delivery, according to the convenience of the traders.

[533] The COURT were of opinion that as the intended voyage was described in the policy, and as there was no regular and settled course, known to all the traders, different from that so described, the ship deviated by putting into Cockenzie first, and consequently that the plaintiff could not recover.

LAWRENCE, J. read the following manuscript case, observing that it was the case of a general policy in which the intended voyage was not described.

"*Clason* v. *Simmonds*, B. R. Hil. 15 Geo. II. at Guildhall, *cor.* Lee, Ch. J. March 11th, 1741. An insurance was made upon goods in the *Gothic Lion* at and from London to her ports of discharge in the Streights as high as Messina; with power in the voyage to stop or stay at any ports or places whatsoever. She was freighted with lead of the plaintiff's from London to Marseilles, and went into Falmouth, where she staid three weeks, and took in a freight of tin for Marseilles. Before she went from London the plaintiff, who was an owner of the ship, declared she was to go directly to Genoa, Leghorn, and Naples, and there was no talk of Marseilles. When the ship was off Marseilles the wind was against her, and she could not then get in, but being driven towards Corsica went to Genoa, and from thence to Leghorn; and in coming back again to Marseilles, being attacked by a Spanish privateer, she was blown up and the lead lost. In the action upon the policy, it was proved by several captains of ships, and so held by the Chief Justice, 1st, That the going into Falmouth and staying there was a deviation. If she had been obliged to put in by necessity, or if it were in the usual course of the voyage, though perhaps not in the direct road, it would be no deviation to put in there. But she stayed at Falmouth three weeks, and took in a freight for Marseilles, which seems to be strong evidence

of having wilfully gone out of the way; and against the declaration of the plaintiff made previous to her going that voyage. 2ndly, That as she did not stop at Marseilles, this was acting contrary to the terms of the policy; for by her ports of discharge must be understood such ports at which it was intended goods should be delivered, and the first of those was Marseilles. 3rdly, It was sworn by several captains to be their opinion (but the Ch. J. did not say any thing to this point) that the going no further in the Streights than Leghorn, and then returning back again, was a determination of the insurance at Leghorn, and the insurers discharged *from the loss that happened afterwards. And upon this there was a verdict for the defendant." [*534]

Per CURIAM:

Rule absolute.

THE KING *v.* THE INHABITANTS OF BUTTERTON.

(6 T. R. 554—556.)

1796. *Feb.* 6.

[554]

The facts that a person built a house on land of another by permission of the owner, and that this person and his eldest son occupied the premises for a period of nearly twenty years without disturbance, are sufficient proof of title in a question of pauper settlement. *Semble* that they would have been sufficient in an ejectment.

[THIS was a case for the opinion of the Court on an order of removal by justices.]

John Hambleton the father of the paupers, being settled *in Butterton, and residing in Kingsley under a certificate from Butterton, about the year 1770 married the daughter of Ralph Oakden who also resided in the parish of Kingsley. By feoffment, with livery of seisin indorsed, dated the 22nd July, 1775, one Michael Paxton, in consideration of ten guineas, conveyed a piece of land in Kingsley to Ralph Oakden, in fee. Soon after the purchase, Oakden gave John Hambleton his son-in-law a part of the land so purchased, but it did not appear that he ever executed any conveyance of it. Hambleton immediately built a house upon the land which cost him above 100*l.*, and he resided in it for fourteen or fifteen years without paying any rent or acknowledgment to Oakden, who lived in a house nearly ad- [*555]

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THE KING v. THE INHABITANTS of BUTTERTON.

joining. He then removed to another house in the same parish, and let the house he had built to a tenant, receiving the rent to the time of his death, which happened about three years after he quitted it. Since Hambleton's death, his eldest son and heir † has continued to receive the rent, and has mortgaged the premises for 42*l.* 18*s.* Oakden died before his son-in-law Hambleton, leaving another daughter, besides Hambleton's wife, and having had a son who died in his father's life-time, leaving children, who are now living; but no claim was ever made to, or rent demanded for, this house since it was built, either by Oakden in his life-time, or by any other person since his death.

Leycester, *Touchet*, and *Ryder*, in support of the order of Sessions, contended, 1st, that no settlement was gained by the father of the paupers by residence upon his own estate; because he had no legal title, but resided there merely as tenant by sufferance. And 2ndly, that there was no alteration in this respect by the descent to the son even if their possession had been adverse to the right owner, which it was not; for at the time when the order of removal was made, the possession had not continued twenty years.‡

LORD KENYON, Ch. J. (stopping *Balguy contrà*):

As twenty years have nearly elapsed since the time when this land was given to the pauper's father, and as no claim has ever been made either on the pauper or his father, the case of *Ashbrittle* v. *Wyley*§ is an authority to shew that the Court ought not to permit the title to this estate to be determined on an order of removal. The strict rules to be observed on the trials of ejectments ought not to be applied to settlement cases. After [*556] such a length of possession as this, perhaps a conveyance *may be presumed to have been executed. And in *R.* v. *Cold Ashton*, where there had been a possession for nearly twenty years, WILMOT, J. said there ought not to be a nicety of computation in

† Who was not removed by this order.

‡ The order of removal was dated 4th June, 1795.

§ 1 Str. 608.

a settlement case, but the Court may presume a conveyance. And even if no conveyance were executed to the pauper's father, and a claim were now made by Oakden's heir at law, he would perhaps be told in a court of equity that, as Oakden stood by while the pauper's father built on this land and treated it as his own, he could only resume the possession on certain terms.

GROSE, J.:

What was said by Mr. J. WILMOT* in the case of *Cold Ashton* is extremely applicable to this case.

LAWRENCE, J.:

I remember a case some years ago in which Lord MANSFIELD would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land.

Both Orders quashed.

CAMPBELL *v.* JONES.

(6 T. R. 570—573.)

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By an indenture made between A. (a patentee) and B., which recited an agreement that in consideration of 500*l.* to be paid by B. to A. in manner thereinafter mentioned, A. would instruct B. in his method, and should also permit B. to use his patent, A. in consideration of 250*l.* paid by B. and of the further sum of 250*l.* to be paid, &c. covenanted that he would with all possible expedition instruct B. in his method; and B. covenanted that he would on or before 25th February, 1794, or sooner if A. should before that time have instructed him, &c. pay the further sum of 250*l.*; held that A. might sue B. for the 250*l.* without averring that he had taught B. the method, &c.

THIS was an action of covenant, contained in an indenture dated 25th February, 1793, made between the plaintiff and the defendant. It recited that the plaintiff had obtained a patent for fourteen years from the 28th of November, 1792, for his invention of an improved method of destroying and taking away all the carbonic oleaginous and colouring elements and particles in linen cotton hemp and in all coloured rags and other materials used in making paper; and that the defendant who then carried

* Burr. S. C. 952.

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on the trade or business of a paper manufacturer was desirous of bleaching and preparing the materials for making paper according to the improved method used by the plaintiff and as set forth in the specification, &c.; that it had been agreed between the plaintiff and the defendant that in consideration of the sum of 500*l.* to be paid by the defendant to the plaintiff in manner thereinafter mentioned, he the plaintiff should teach and instruct the defendant in the bleaching and preparing of all materials for making paper according to the said specification and improved method of the plaintiff, and should also permit and suffer the defendant during the continuance of the patent to bleach, &c. the materials for making paper according to the specification, &c. to the extent only and subject to such restrictions provisoes and agreements as were and are thereinbefore mentioned expressed declared and contained. That in pursuance of the agreement and for and in consideration of the sum of 250*l.* to the plaintiff paid by the said defendant and of the further sum of 250*l.* covenanted to be paid by the defendant to the plaintiff in manner thereinafter mentioned, and in consideration of the covenants and agreements of the defendant thereinafter contained, the plaintiff covenanted that he would to the best of his skill and with all possible expedition teach and instruct the defendant in the manner and method of bleaching, &c. linen and other materials used in making paper according to the direction [*571] of *the specification, &c. and according to the method which he then used, or any improved method which he should or might thereafter use in bleaching, &c. That the defendant, in consideration of the plaintiff's covenants, covenanted that he would on or before the 25th of February, 1794, or sooner in case the plaintiff should before that time have sufficiently taught and instructed him in bleaching and preparing the materials for making paper, &c. pay to the plaintiff the further sum of 250*l.* It then set forth a breach of covenant by the defendant in not paying the said further sum of 250*l.* on or before the 25th of February, 1794, or at any time afterwards.

To this declaration there was a special demurrer; and these causes were assigned, that it appears by the declaration that the plaintiff had covenanted to teach and instruct the defendant in

the manner and method of bleaching, &c. used in making paper in the manner set forth in and by the covenant stated in the declaration, and that the defendant in consideration thereof covenanted to pay to the plaintiff the said sum of 250*l.* the breach of which covenant is alleged as the cause of action in the declaration, and yet it is not averred in the declaration that the plaintiff had taught and instructed the defendant in the manner and method of bleaching, &c. used in making paper according to the specification or in any other manner, &c.

This case was argued in last Michaelmas Term by *Shepherd* in support of the demurrer, and by *Lawes* against it. The former referred to these cases: *Kingston* v. *Preston*, cited in Dougl. 668; *Duke of St. Albans* v. *Shore*, 1 H. Bl. Rep. C. B. 270; *Hotham* v. *The East India Company*, 1 T. R. 638; † and *Goodison* v. *Nunn*, 4 T. R. 761. The latter cited these authorities: *Martindale* v. *Fisher*, 1 Wils. 88; *Boone* v. *Eyre*, 2 Bl. Rep. 1312, 1 H. Bl. Rep. C. B. 273, n. a; ‡ *Callonel* v. *Briggs*, Salk. 112; *Thorpe* v. *Thorpe*, Salk. 171; 1st point; *Jones* v. *Barclay*, Dougl. 684; *Bach* v. *Owen*, 5 T. R. 409; and 2 Saund. 156.

The COURT took time to consider of this case, and now their opinion was delivered, as follows, by

LORD KENYON, Ch. J. (after stating the case):

In support of this demurrer it was said that the plaintiff's teaching the defendant his method of bleaching the materials used in making paper was a condition precedent to the plaintiff's right to demand payment of the last sum of 250*l.*: on the other hand it was insisted that they were mutual and independent covenants. Whether these kinds of covenants be or be not *independent of each other must certainly depend on the good [*572] sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done. "Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to

† 1 R. R. 333. ‡ 2 R. R. 768.

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be averred unless a day is appointed for performance." Per HOLT, Ch. J. Salk. 113. "If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money before the thing be done." Ib. 171. Upon the authority of these cases the judgment of the Court must be in favour of the plaintiff, if upon the true construction of the deed a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants with all possible expedition, not by any fixed time, to instruct the defendant in bleaching linen, &c., and in consideration of the plaintiff's covenants "the defendant covenants that he will on or before the 25th of February or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l.*" To support the construction contended for by the defendant this covenant must be understood as if it had been written thus, "And the said Griffiths, the defendant, doth hereby covenant that he will on or before the 25th of February, in case the plaintiff shall before that time have instructed him, and sooner in case the plaintiff shall before that time have instructed him, pay the further sum of 250*l.*;" which is in effect covenanting to pay the money as soon as the plaintiff should have instructed him. Now had this been the intention of the parties, the natural and obvious way of expressing such intent would have been for the defendant to covenant to pay as soon as he should be taught: but if the design of the parties were that the plaintiff at all events should be paid on the 25th of February, and sooner in case the defendant should be sooner instructed, the expression here used is a natural expression, and the words "in case the said Hector, the plaintiff, should before that time have instructed the said Griffiths," the defendant, will be confined to the word sooner. The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed.

But another ground on which the plaintiff is entitled to judgment is this, that the teaching of the defendant is not the whole consideration of the covenant to pay. The agreement of

*the parties is that in consideration of one entire sum of 500*l.* the plaintiff should teach and instruct the defendant in the art of bleaching materials for making paper and permit him during the period of his patent to bleach such materials according to his specification; and though this sum is divided into two sums of 250*l.* each, and is to be paid at different times, no part is denominated to be the consideration of using the patent, nor any part as the consideration of teaching, but one integral sum is adapted to the whole. Under this agreement the defendant has a perfect title to use the patent, and the instruction of the defendant cannot be taken to be the most material part of the consideration, as the specification must be supposed to contain full instruction for that purpose, though some advantage might arise from the assistance of the inventor. In the case of *Boon* v. *Eyre*, E. 17 Geo. III. Lord MANSFIELD said "The distinction is clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions: but where the covenants go only to a part, and where a recompense may be had in damages, it is a different thing." And Mr. J. ASHHURST added, "there is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate because the plaintiff has not a title to a few negroes." So here the covenant to teach is but part of the consideration of the 500*l.*; for not doing which the defendant may recover a recompense in damages. And the agreement of the plaintiff having been executed in part by transferring to the defendant a right to exercise his patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by the plaintiff's not having instructed him.

For these reasons we are all of opinion that

Judgment must be for the plaintiff.

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DURRANT *v.* BOYS AND BURGIS.

(6 T. R. 580—582.)

If a person rated to the poor has any objection to the rate, *e.g.*, that it is made for six months, he must appeal to the next Sessions; and if he do not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate.

To trespass for seizing and converting the plaintiff's cattle, the defendants pleaded the general issue. On the trial before the Lord Chief Baron at the last Summer Assizes for Kent, a verdict was entered for the plaintiff for 12*l.* 2*s.* subject to the opinion of this Court on a case which stated, in substance, as follows:

That the plaintiff is the occupier of a farm in Sandhurst. That the defendant Boys is an acting justice of the peace, and the defendant Burgis one of the overseers of Sandhurst. "That it has been usual in Sandhurst to make two assessments in a year for the relief of the poor (viz.), one soon after Easter and the other soon after Michaelmas, although in some years a third assessment has been made. That the rate in question was made on the 2nd of October, 1794; and though it does not purport to have been for any particular time, was in truth intended by the overseers, and understood by the justices, to have been intended for six months prospectively." That the plaintiff not having paid this rate, Boys and another magistrate granted a warrant of distress against the plaintiff, and Burgis executed it on the 4th of December, 1794. And that the plaintiff never appealed against this rate.

Adam, for the plaintiff:

The rate under which the defendants justified, was illegal, it having been made for a longer time than is authorised by the stat. 43 Eliz. c. 2, and consequently the parties acting under it are trespassers. That statute first directs the overseers to raise weekly or otherwise, &c. and afterwards directs them to meet once in every month for the purpose of putting the act in execution, and of course they have no authority to make a rate for a period of six months. In *Tracey* v. *Talbot* * Lord HOLT

* Salk. 532.

said that a person could not be rated for a whole quarter, for poor rates are to be assessed monthly by the statute. In *R.* v. *Littleport* † Lord HOLT said "there ought to be a monthly rate." In the case of the churchwardens of *Bishopsgate* v. *Beecher*,‡ where a rate had been made for a whole year, the Court said it could not be made for more than one quarter. And in *Stevens* v. *Evans*,§ it seemed to be admitted that a poor rate could not be made for half a year. If it be observed that in some of these cases the Court allowed a rate to be good that was made for more than one month, yet the time ought not to be *extended [*581] to six months, because it is neither advantageous to the poor or convenient to the occupiers who pay. And if the rate in question were illegal, this was an excess of jurisdiction, for which the defendants are liable in trespass. Hardr. 480, and 1 Burr. 595.

LORD KENYON, Ch. J.:

We are not now called upon to say what the Quarter Sessions should have determined if there had been an appeal to them against this rate, though I cannot forbear observing that there is nothing illegal on the face of the rate. The principal objection that has now been made is, that the rate is bad because it is a prospective rate: in order to prevent any mistakes that may hereafter arise in other cases from a supposition that this objection is well founded, it is necessary to declare that a prospective rate may unquestionably be good. Every person, who is conversant in matters of this kind, knows the impossibility of foreseeing and providing for every expense that may arise; and therefore a rate may be made prospectively, not indeed wantonly, but such as is adapted to the probable exigencies of the parish. But here I desire to enter my protest against deciding on the practice of making rates in this parish, as was suggested in the case of *Stevens* v. *Evans*; because this question arises on a statute made within time of legal memory, and in construing an Act of Parliament we cannot decide on the practice that may have obtained in any particular parish, for then there would be different constructions of this law in

† 6 Mod. 98. ‡ 8 Mod 10. § 2 Burr. 1152.

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different parts of the kingdom. But the short answer to this action is furnished by the case of *Hutchins* v. *Chambers*,† where Lord MANSFIELD, after the first argument, said "all about the rates is clearly out of the present case; for if they are bad, the parties who thought themselves aggrieved should have appealed." This authority, which has convenience as well as reason and law, for its foundation, is directly in point. Therefore if it had appeared on this rate that it was made for six months, and if the plaintiff wished to object to it on that account, of the validity of which objection I will say nothing, he ought to have appealed against it at the Sessions. The Legislature seem to have been anxious that preliminary objections to a rate should be made in the first instance: the stat. 17 Geo. II. c. 28, directs that poor-rates shall be published in the church the next Sunday after they are allowed; and any persons objecting to the rates must appeal to the next Sessions; [*582] there the question is decided in a *forum domesticum*, *and in many instances before the rates are collected. Therefore on the authority of that case, I am clearly of opinion that the plaintiff should have objected to this rate (if he thought it objectionable) by appealing to the Quarter Sessions; and having waived making his objection there, it is not competent to him to make it in this action.

ASHHURST, J.:

The case of *Hutchins* v. *Chambers* seems decisive of the present.

GROSE, J.:

The question here is, whether the overseers exceeded their jurisdiction in making this rate. Nothing appears on the face of the rate to shew us that they did; but the plaintiff has resorted to the usage of the parish to shew that this was intended to be a prospective rate. Even if it had appeared on the rate itself that it was made for six months, I do not think it would have been an excess of jurisdiction. The statute 43 Eliz. c. 2 directs the overseers "to raise weekly, or otherwise by taxation, &c." The Legislature, seeing the necessity, in

† 1 Burr. 580.

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particular cases, of extending the rate beyond one week, added those general words "or otherwise;" leaving it to those who make the rate to adapt it to the exigencies of the parish. Some of the cases also shew that a rate may be made for two or three months; and if for that time, why not for six months? If indeed a rate made for any time be injurious to a particular person on account of his leaving the parish before the expiration of that time, or on any other account, he should appeal against it to the Sessions, who will relieve him on his proving that he is aggrieved by it. But as this plaintiff did not appeal against the rate, the case of *Hutchins* v. *Chambers*, shews that it is binding on him, and that the defendants are justified in having acted under it.

LAWRENCE, J. of the same opinion.

*Judgment of nonsuit.**

K. B. EASTER TERM.

GOVIER *v.* HANCOCK.

(6 T. R. 603—604.)

1796. *April* 14.

[603]

Held that a husband was not bound to receive or to support his wife after she had committed adultery, though he had before committed adultery himself, and turned her out of doors, without any imputation on her conduct.†

THIS was an action of assumpsit brought by the plaintiff for the board and lodging of the defendant's wife. The defendant having committed adultery with a woman of the name of Bazely whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband

* It having been agreed to enter a nonsuit, if the Court were of opinion that the plaintiff could not recover.

† See *Norton* v. *Fagan*, 4 R. R.; *Cooper* v. *Lloyd* (1859) 6 C. B. N. S. 519, 525; and compare *Wilson* v. *Glossop* (1887) 19 Q. B. D. 379; 20 Q. B. D. 354, 57 L. J. Q. B. 161.—R. C.

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would not receive her; and this action was brought for her board and lodging subsequent to that time. Mr. Justice BULLER, before whom the cause was tried at the last Taunton Assizes, was of opinion that the husband was not bound to receive the wife after she had committed adultery, and consequently was not bound to support her; and he directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him if this Court should be of opinion that the defendant was liable under these circumstances. Accordingly

Bond now moved to set aside the verdict, on the ground that as the defendant had been the aggressor, and had turned his wife out of doors at a time when there was no imputation on her conduct, he was bound to provide for her, notwithstanding she afterwards committed adultery; that in this respect it differed from the case of the wife being the aggressor, and eloping with an adulterer,* in which case the husband was discharged; that it had never yet been determined that under these circumstances the husband was not liable, and that upon principle he was liable.

[604] But the COURT said that though this precise case did not appear to have been controverted before, it was probably because the point had not been doubted; and that it must be governed by the same principle on which it had been determined that the husband is not liable in cases where the wife goes away with an adulterer. That this was not a modern rule, but was mentioned by Lord COKE,† that if a wife go away with an adulterer she loses her dower. That the question depended upon this, whether the necessaries were provided before or after the wife had committed adultery: if after, the action could not be maintained. And that in this case if the wife had instituted a suit in the Ecclesiastical court against the husband for restitution of conjugal rights, they would not have assisted her. They therefore

Refused the rule.

* *Vid. Morris* v. *Martin*, 1 Stra. 647.

† Co. Lit. 32, a.

CRIPPS *v.* READE.

(6 T. R. 606—607.)

1796. *April* 15.

[606]

Defendant supposing himself the legal representative of lessee for years sold the term, and delivered the lease to plaintiff, but without any assignment or formal conveyance, saying the premises were his, and if anything happened he would see plaintiff righted: Held that plaintiff may maintain an action against him for money had and received, the rightful administrator or tenant for years having ousted the plaintiff by ejectment.*

ASSUMPSIT for money had and received to recover a sum of forty guineas, which had been paid by the plaintiff to the defendant for the purchase of a leasehold estate. The defendant claimed the estate in question as administrator to Mary Bartlett, who had taken out letters of administration to her husband, the former possessor of the estate, under the name of Caleb Bartlett, his real name being Carey Bartlett. On the sale the lease itself was delivered to the plaintiff, but there was no assignment or other conveyance from the defendant: but a conversation took place between them in which the latter said "that the premises were his right and property to do as he liked with, and if any thing happened he would see the plaintiff righted." Afterwards John the nephew of Carey Bartlett took out administration to him by the right name, and recovered possession of the premises by ejectment.

It was contended on the part of the defendant at the trial, 1st, that no action lay to recover the purchase-money, on the authority of *Bree* v. *Holbech* † where under circumstances of a similar nature the principle of *caveat emptor* was held to apply. But 2ndly, if any action could be maintained, it could only be on the special warranty. But LAWRENCE, J., before whom the cause was tried at the last Oxford Assizes, over-ruled the objections, and directed a verdict to be found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Plumer now made that motion, upon the grounds mentioned at the trial. But

* Compare the cases where there has been a formal conveyance:—*Clare* v. *Lamb* (1875) L. R. 10 C. P. 334, 339; 44 L. J. C. P. 177; and authorities there cited.—R. C.

† Dougl. 654, 3rd edit.

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The COURT refused the rule.

LORD KENYON, Ch. J.:

I do not wish to disturb the rule of *caveat emptor* adopted in *Bree* v. *Holbech*, and in other cases where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts and for those of his ancestor, in *which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title: but here the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back; in the case cited no action at all could have been maintained.

[*607]

Rule refused.

1796. April 18.

[607]

SEDDON AND OTHERS *v.* TUTOP.

(6 T. R. 607—610.)

Plaintiff in a former action declared on a promissory note, and for goods sold, but upon executing a writ of inquiry after judgment by default gave no evidence on the count for goods sold, and took his damages for the amount of the promissory note only. Ruled that the judgment thereupon is no bar to his recovering in a subsequent action for the goods sold.†

ASSUMPSIT for goods sold and delivered. Plea a former recovery of 71*l.* 10*s.* for the damages the plaintiffs had sustained as well by means of not performing the same identical promises, &c. as for their costs, &c. Replication that the promises and undertakings in this action were not the same identical promises for the non-performance whereof the said sum of money was so recovered by the said judgment: on which issue was taken. At the trial at Guildhall before Lord Kenyon it appeared that in the former action, in which the defendant suffered judgment to

† See *Jones* v. *Brassey* (1871) 24 L. T. 947, 951; *Brunsden* v. *Humphrey* (1884) 14 Q. B. D. 141, 147; 53 L. J. Q. B. 476.—R. C.

go by default, there was a count on a promissory note for 51*l.* and counts for goods sold and delivered, there being at that time 25*l.* 7*s.* due for goods: but on executing the writ of inquiry the plaintiffs only being prepared with proof of the note, they took a verdict for that, which with the costs amounted to 71*l.* 10*s.* Afterwards on an application to the defendant for the 25*l.* 7*s.* he refused to pay, on which the present action was brought. It was objected on behalf of the defendant that as the plaintiffs might have recovered this sum in the former action, they ought not to be permitted to bring this, a second action, for the same demand. But a verdict was taken for the plaintiffs, with liberty to the defendant to move to enter a nonsuit in case this Court should be of opinion that the plaintiffs were not entitled to recover. A rule for that purpose having been accordingly obtained,

Erskine now shewed cause against it:

In justice the plaintiffs are entitled to recover, because it is admitted that they have a fair demand on the defendant for 25*l.* 7*s.* which the latter does not pretend has ever been satisfied, but he wishes to shelter himself under a technical objection, that because the plaintiffs might have recovered this demand in the former *action and did not, they shall not recover it in this. But, [*608] on examining the issue which was to be tried in this action, it will be found that this formal objection cannot be supported. The issue is that "the promises and undertakings in this declaration are not the same identical promises and undertakings for the non-performance whereof the said sum was so recovered by the said judgment." Now the only promise for not performing which the said sum in the former action was recovered was respecting the promissory note, a promise entirely distinct from the promise to pay for the goods which are the subject of this action. The defendant therefore fails in that which he has pleaded as an answer to the present action. Suppose the plaintiffs had inserted only one count in the former action, that on the note, there would have been no pretence for this objection, and the case is not varied by the introduction of other counts on which no evidence was then given.

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Mingay in support of the rule:

This is not a mere formal objection, but an objection founded on the justice and the hardship of the case as it respects the defendant, since if it do not prevail he will be harassed with the expense of two actions when one would have answered the plaintiff's purpose. According to the cases of *Woodford* v. *Eades*, 1 Str. 425; *Hall* v. *Stone*, *ib.* 515; and *Markham* v. *Middleton*, 2 Str. 1259, the plaintiffs should have moved to set aside the inquisition in order that they might have an opportunity of proving their whole demand in the former action; and in the latter of those cases the Court considered that unless they interposed in that manner, the plaintiff would be barred by the former verdict. The practice at *nisi prius* is also conformable to this last decision; for if a plaintiff be only prepared to prove a part of his case, he generally submits to a nonsuit to prevent his being barred by the verdict. Whereas according to the principle now contended for on behalf of the plaintiffs, even a recovery in this action will not be conclusive between the parties, if the plaintiffs can in a third action shew that no evidence was now given for any one small article, though that article might have been proved either in the former or the present action.

LORD KENYON, Ch. J.:

There cannot be two opinions respecting the justice of this case. It is admitted that the plaintiffs had two demands against the defendant, the one on a promissory note, the other for goods sold, that on executing the writ of inquiry in the former action [*609] evidence was only *given on the first demand, that the plaintiffs recovered damages adapted to that demand, and that the other demand for the goods still remains unsatisfied. By attending to the pleadings in this action it will also be found that the plaintiffs are right in point of form. The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not. The case of *Markham* v. *Middleton* is extremely different from the present. There the plaintiff had but one demand; and though the jury gave inadequate damages for that demand on account of the plaintiff's not being prepared with proof of his

whole bill, he would have been barred by that verdict if it had stood: but in this case there were two distinct demands, not in the least blended together; and though the plaintiffs might in the first action have proved this demand, owing to inadvertence they did not, and the recovery on the note in that action is no bar to their demand in this, which is for goods. In truth, this is a question of great delicacy: we must take care not to tempt persons to try experiments in one action, and when they fail, to suffer them to bring other actions for the same demand; the plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action be the same: he ought to shew beyond all controversy that the second is a different cause of action from the first in which he failed. In this case it is clearly shewn that this demand was not inquired into in the former action. And I am glad that we are borne out by the form of the issue to decide with the justice of the case.

GROSE, J.:

The recovery in the former action is only *primâ facie* evidence that this demand has been inquired into, but it is not conclusive. In the case of *Hitchin* v. *Campbell*,† where the defendants pleaded a former recovery upon the same identical premises for which that action was brought, though it was argued by very eminent counsel, it was not contended that because the same sum demanded in that action might have been recovered in the former one, therefore the plaintiff could not recover it in that action; the only inquiry there was, whether the same cause of action had been litigated and considered in the former action.

LAWRENCE, J.:

The principle on which this case is determined is not new. It is the same as that on which the case of *Hitchin* v. *Campbell* was decided. There the parties went into *evidence to see whether [*610] the former verdict were for the same cause of action: but there would have been no occasion to have gone into that evidence if the defendant could have contented himself with shewing that

† 2 Bl. Rep. 827, and 3 Wils. 304.

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there had been a former verdict, and that the demand for which the second action was brought existed prior to the first action. So in the cases of *Ravee* v. *Farmer*,* and *Golightly* v. *Jellicoe*,† it was held that an award made on a reference of all matters in difference between the parties was no bar to any cause of action that the plaintiff had against the defendant at the time of the reference, if the plaintiff could prove that the subject matter of the action was not inquired into before the arbitrator. In this case it was necessary to aver that this action was brought for the same promises; and whether it were or not was a subject of inquiry at the trial.

Rule discharged.

1796.
April 19.
[610]

DOE, ON THE DEMISE OF G. SPEARING, *v.* BUCKNER.

(6 T. R. 610—613.)

The testator, having given 4,000*l.* to A. and B. in trust for certain persons, by a residuary clause gave "All the rest of his estate and effects of what nature soever to A. and B. their executors and administrators in trust to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid:"—held that a house, the only freehold house of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause "as to all his estate and effects both real and personal."‡

THE lessor of the plaintiff is heir at law of the devisor J. Spearing, and the defendant Admiral Buckner is the surviving trustee and executor named in his will. This action was by the consent of both parties tried before Lord Kenyon at the Sittings in London after last Trinity Term, when a verdict was taken for the plaintiff, subject to the opinion of this Court upon the whole case. The testator the Rev. J. Spearing, being seised of a freehold house at Winchester, and of a considerable personal but no other real estate, by will dated the 11th of April, 1789, after giving directions for his funeral, said "As to my estate and effects both real and personal I give and dispose thereof in manner following: that is to say, First, I give to C. Buckner

* 2 R. R. 347.
† Ib. in note.
‡ Compare *Doe* v. *Chapman*, 2 R. R. 755.

one of my trustees and executors hereinafter named 100*l.* and to G. Spearing (not the lessor of the plaintiff) the sum of 500*l.*" Then after giving some other small pecuniary legacies the testator gave to his servant J. Lemon an annuity of 40*l.* to be paid him yearly by his trustees and executors, for his life, directing that J. Lemon's receipt only should be a sufficient discharge to his trustees and executors: and charging his freehold messuage in Winchester with the payment of the annuity. The testator then gave to his trustees and executors C. Buckner and J. Robinson *their executors and administrators the sum of [*611] 4,000*l.* upon trust to pay the interest at 4*l.* per cent. by half-yearly payments to his sister Jane then the wife of B. Middleton for her life, &c. remainder to her children, &c.; and for want of children then upon trust that the trustees should pay over the said 4,000*l.* unto M. and R. Buckner children of C. Buckner equally share and share alike. The will then proceeded in these words "And my further will is that if my trustees shall make a greater interest than 4*l.* per cent. for the sum of 4,000*l.* then I desire that such increase of interest shall sink into and become part of the residue of my estate. And also all the rest residue and remainder of my estate and effects of any and what nature or kind soever or wheresoever, I give and bequeath the same unto C. Buckner and J. Robinson their executors or administrators in trust that they shall from time to time add the interest thereof to the principal, so as to accumulate the same, as it is my will that the said residue shall not be paid or payable but at the time and in the manner and to the several persons as the said principal sum of 4,000*l.* is hereinbefore directed to be paid." He then appointed C. Buckner and J. Robinson executors. Both the executors proved the will, but J. Robinson is since dead; C. Buckner being in receipt of the rent of the house at Winchester hath regularly paid J. Lemon his annuity. The testator's sister Mrs. Middleton is also lately dead without leaving any children, so that M. and R. Buckner the two children of the defendant are now become entitled to the whole residue of the testator's estate. The question for the opinion of the Court is, whether the house at Winchester charged with the 40*l.* a year to J. Lemon for his life, there being no specific devise of it in the

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will, passes subject thereto to the defendant C. Buckner the surviving trustee and executor upon the trusts mentioned in the will, or whether the same descends as being undevised and undisposed of by the will to G. Spearing the lessor of the plaintiff, as the testator's heir at law? [This was added after the case was argued the first time,† "The personal estate of the testator J. Spearing is sufficient to satisfy the several trusts of the will and also the several legacies."]

Alderson for the lessor of the plaintiff:

There is no part of the will under which it can be contended that the house in question passed, but the residuary clause; for the only clause in which the house is mentioned by name is that in which the annuity to J. Lemon is charged upon it, but that [*612] contains *no devise of the house itself. And with regard to the residuary clause, that is confined merely to personalty; for, first, whatever is included in it is given to trustees and their executors; *Shaw* v. *Bull*, 12 Mod. 592; secondly, they are to add the interest to the principal, which by a reference to the preceding clause means the principal of 4,000*l.* in money; and thirdly, it is to accumulate, and the residue is not to be paid until the principal sum of 4,000*l.* is made payable. Now all these expressions evidently shew that the testator was speaking of personalty only. Then the estate in question not being devised, it passes to the lessor of the plaintiff as the heir at law.

Mingay, contrà:

It would be a singular construction of a will of a testator, who had only one freehold estate, the house in question, and who professed at the beginning of his will to dispose of "his estate and effects both real and personal," to say that he only disposed of his personalty, and that he intended to die intestate with respect to the only real estate he had. But on examining the introductory and the residuary clauses it will be found that he intended to, and did, dispose of all his property whatever. The first declares his intention to do so; and the words of the latter are sufficiently comprehensive to give effect to that

† This first came before the Court in the last Term, Friday, Feb. 5th.

intent. The terms used are "the rest residue and remainder of my estate and effects." And though the words "executors and administrators" be added, they will not control the operation of the preceding words, it appearing to have been the devisor's intention to dispose of his real as well as personal estate; as was held in *Doe* d. *Beezley* v. *Woodhouse*, 4 T. R. 89.

LORD KENYON, Ch. J. (after stating the case):

It is our duty to give effect to the intention of the testator, if that can be discovered; but if we cannot find out that intent, the title of the heir at law must prevail; and it is on the latter ground that my opinion proceeds in this case. I do not see any words in the will to disinherit the heir at law. One of the trustees takes a beneficial interest in a former part of the will; and there is nothing in the will from which it can be collected that the testator meant to confer any other beneficial interest on either of them. The testator set out in the beginning of his will as if he had intended to dispose of all his property. But though those general words would have shewn his intention if there had been subsequent words in the will to carry that intent into execution, as was held by Lord TALBOT in *Ibbotson* v. *Beckwith*,† it has been held in a variety of *cases ‡ that alone they are not sufficient [*613] to dispose of a fee. And by adverting to the residuary clause there are no words to pass the estate in question. The testator only meant that that should extend to his personal estate. It is given to trustees, their executors and administrators, technical terms applicable to personalty. But I rely on the following words of the clause, "To add the interest to the principal, so as to accumulate the same." The interest and principal were to make one consolidated sum of the same nature: but these are terms wholly inapplicable to a real estate. Seeing therefore that there is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees to take it to perform any trust in them, the heir at law stands entrenched in his right as heir, and cannot be removed from it.

† Cas. temp. Talb. 157.

‡ *Vid.* Cowp. 660, 661; Dougl. 759; and *Goodright* d. *Baker* v. *Stocker*, 5 T. R. 13.

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The addition to the case, that the personal estate was sufficient to discharge the several trusts, is satisfactory to our own minds, though it is not the ground of our decision.

Per CURIAM:

Postea to the plaintiff.

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THE KING *v.* SIR JOSEPH MAWBEY, BART., JAMES LIPTROTT, CLERK, RALPH LEYCESTER, ESQ., AND THE REVEREND EDWARD COOPER.

(6 T. R. 619—640.)

A certificate by justices of the peace that a highway (indicted) is in repair is a legal instrument recognized by the courts of law, and admissible in evidence after conviction when the Court are about to impose a fine.

And consequently it is illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the Court.

In stating such a crime in an indictment, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purposes they agreed to certify the fact as true, without knowing that it was so.

AN indictment was preferred against the defendants at the general Quarter Sessions of the Peace held for the county of Surrey in October, 1794, which stated that at the summer assizes, 1791, a certain bill of indictment was preferred and found against the inhabitants of the parish of Windlesham in Surrey for not repairing parts of a certain highway therein described, which were [*620] thereby charged to be and were ruinous, *&c., that afterwards, to wit, at the ensuing spring assizes on 21st March, 1792, H. Lee and E. Hammond, two inhabitants of the said parish of Windlesham, for themselves and the rest of the inhabitants of the said parish pleaded Not guilty to that indictment, and issue was joined thereon; that afterwards, to wit, at the next assizes holden, &c. on 8th August, 1792, the said H. Lee and E. Hammond by leave of the Court withdrew their plea of Not guilty and pleaded Guilty; whereupon the said Court not being then advised of giving judgment upon the premises proceeded to inquire,

and a certain inquiry was then and there made by and before the said Court, into the then state and condition of the said parts of the said highway which by the said indictment were so alleged to be out of repair, the said Court having then and there competent power to make the said inquiry. This indictment then stated that the two defendants, Mawbey and Liptrott, were then and still are justices of the peace in and for the county of Surrey, and that the other two defendants, Cooper and Leycester, were inhabitants of the parish of Windlesham; and that the defendants unlawfully and wickedly conspiring combining and confederating together to obstruct and pervert the due course of justice and to deceive and impose on the said last mentioned Court at which such inquiry, &c. was so made, and unjustly to have it understood and believed by the said Court that those parts of the highway had been sufficiently repaired by the inhabitants of the parish of Windlesham after the preferring of the said indictment and before the making of such inquiry, and that the said several parts, &c. at the time of the making of the said inquiry were in good and sufficient repair, and thereby unjustly to influence in favour of the inhabitants of Windlesham the judgment to be given upon the said indictment, after the pleading of such plea of Not guilty as aforesaid to the said indictment, and before the same was so withdrawn as aforesaid, and also before the making of such inquiry as aforesaid, to wit, on the 24th of July, 1792, at, &c., unlawfully did conspire combine confederate and agree to produce and exhibit in evidence unto and before the last mentioned Court, on behalf of the inhabitants of the said parish of Windlesham, at and upon the said inquiry so there made as aforesaid, a certain paper writing under the hands and seals of the said Sir Joseph Mawbey and J. Liptrott dated 24th July, 1792, as and for a true certificate in writing by and under their hands and seals as such justices as aforesaid touching and concerning the said parts of the said highway so alleged to be out of *repair, &c. It then [*621] set out the tenor of the certificate which was in the common form, certifying the road to be in sufficient repair. It then stated that the four defendants in pursuance of the said conspiracy, &c., and with such intent to influence the judgment upon the said indictment as aforesaid, afterwards, to wit, at the said general

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sessions of oyer and terminer so holden as last aforesaid did produce and exhibit to the Court there, at and upon the said inquiry, &c., the said paper writing before mentioned, as and for a true certificate in writing by and under the hands and seals, &c.; they the said defendants thereby then and there unjustly intending to have it understood and believed by the said last mentioned Court that the said highway, &c. had been sufficiently repaired before the said inquiry, &c. and that the said highway on the 24th July, 1792, and at the time of making the said inquiry was in good repair: whereas the highway was on the 24th July, 1792, and at the time of making such inquiry, &c., and also at the time when the defendants exhibited in evidence the certificate, &c., ruinous and in great decay, &c., and so the defendants knew at the time of their producing and exhibiting the said paper writing in evidence; to the great obstruction of public justice, &c. * * *

[622] Upon the trial at the spring assizes, 1795, the defendants Cooper and Leycester were acquitted, and the other two defendants Mawbey and Liptrott were found guilty. In Easter Term, 1795, Piggot obtained a rule to shew cause why a new trial should not be granted upon the merits as to the two defendants who were convicted. But upon that occasion the Court suggested a difficulty whether a new trial could be granted as to some of the defendants on the record, and not as to others; and they desired this matter might be first argued before the merits of the question were spoken to.

[The question thus raised was accordingly argued on a subsequent day of the Term, and the matter stood over for discussion on the merits.]

[627] Before it was disposed of another rule was obtained calling on the prosecutor to show cause why the judgment should not be arrested, which was first argued at the desire of the Court; because if the indictment could not be supported, (they said) it would be unnecessary to determine the other point relative to the granting of the new trial. The grounds alleged for arresting the judgment were, because no specific crime was laid in the indictment, the certificate of the magistrates not being an instru-

ment from whence any legal consequence could be derived, not being upon oath, nor binding on the Court to receive it, but being in its nature traversable; and because if such a certificate were the subject of a conspiracy, for which an indictment might have been framed, the crime was not properly charged in this indictment.

In Hilary Term, 1796, *Farhill* shewed cause against the rule for arresting the judgment. The indictment contains two criminal charges against the defendants: 1st, A conspiracy, which is always taken *in malâ parte*, 2 Burr. 997; 2ndly, A public fraud and deceit on the court of assize. As to the conspiracy, it follows from the very nature of the offence that there is no charge of any specific crime, but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy to be found in the books. 1. Where the subject-matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual, but the criminality in law arises wholly from the conspiracy. Such is an agreement to maintain each other right or wrong, 9 Co. 56. A combination amongst labourers or mechanics to raise their wages, 8 Mod. 10. So where several conspired to hiss at the Birmingham Theatre, Lord MANSFIELD held it indictable, although each might have done so separately, 18 or 19 Geo. III. B. R. So a combination between officers in the service of the East India Company to resign their commissions was held an illegal act; and consequently a resignation tendered under those circumstances was held not to be a determination of the service, 4 Burr. 2472. 2nd. Where the subject-matter is not *malum prohibitum* as referred to the individual, though *malum in se*, but the criminality in law arises from the conspiracy: such is a malicious combination against a trader to ruin him in his trade, 1 Stra. 144, 1 Lev. 125; *R.* v. *Eccles*, B. R. 24 Geo. III. So the taking up of dead bodies, even though for the purposes of science in dissecting them, is now held an indictable offence *per se*, *R.* v. *Lynn*, 2 T. R. 733; yet formerly it was not so considered; but even then it was held that an indictment lay for conspiracy to do so, *Rex* v. *Young*, cited ibid. A false indictment [628]

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is no crime as referred to the individual, 1 Ed. III. st. 2, c. 11, 2 Blac. Rep. 1328, 9; but a conspiracy for that purpose subjects the offenders to the villainous judgment, ibid. The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, 1 Lev. 62, 1 Ventr. 304; though no legal charge be actually preferred, Salk. 174, 1 Stra. 193, 3 Burr. 1320. And in this latter case it was held that the Quarter Sessions had jurisdiction over conspirators. It is the same with private immorality, which is only [*629] indictable when coupled with a conspiracy, *Salk. 382, 552, 3 Burr. 1434, 1878, 2 Ld. Raym. 1031, 4 St. Tr. 515. So two or more joining to do legal acts with a corrupt intent may be indicted, *R.* v. *Robinson*, Leach, C. L. 35, 8 Mod. 321, 1 Wils. 41, 3 Burr. 1439. And private deceits coupled with a conspiracy, are indictable on that account, 6 Mod. 42, 301, 2 Burr. 1127, 2 Stra. 860. 3rd. The third head of conspiracy is where the subject-matter is *malum prohibitum* as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, Fitzg. 66, or public justice. And the latter will apply to both description of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, 1 Hawk. ch. 21, s. 15, 2 Stra. 904; or the preparation of witnesses, Hob. 271, 3 Inst. 106, 2 Show. 1; or the tampering with jurors, Saund. 300, 1 Ld. Raym. 148, 1 Burr. 510; *Rex* v. *Jolliffe*, 4 T. R. 285, Co. Lit. 157. Such are public frauds in trade, 1 Sess. Cas. 217, Comb. 16, 1 Sid. 409, 1 Ventr. 13; or public cheats, 5 St. Tr. 486, 1 Latch. 202, 1 Roll. Rep. 2, 2 Ld. Raym. 865, 1 Barnard, 330; or deceit or collusion in the king's Courts or any consent thereto, 3 Ed. I. c. 29, 2 Inst. 212, 217. 4th. Where there is a bare conspiracy unexecuted, or where the conspiracy by the execution merges in a higher offence. Where it is unexecuted, as in the several foregoing instances, 1 Lev. 62, 125, 1 Ventr. 304, 3 Burr. 1320, 1 Ld. Raym. 379, 1 Salk. 174, 1 Stra. 193, T. Raym. 417; where it merges, 1 Ld. Raym. 711. Such being the general nature of the crime of conspiracy, which is not and cannot be a specific definite offence, but depends upon the particular circumstances either of a corrupt intention or of its tendency to a

breach of the peace; it is now to be shewn in what manner the offences laid in the five first counts fall within the principles of the above cases. The criminality of the defendants arises from their abuse of their offices of conservators of the peace and of justices, and from the imposition which they practised upon the Court; and the conspiracy aggravates each of these offences. As conservators of the peace: In Lamb. 508, it is stated to be the common right of the subject to inform the king's Court, and particularly the duty of peace officers, who are *ministri curiæ*, 4 Blac. Com. 267. The duty of constables is to present all offences inquirable in the leet, which come within their knowledge, 2 Hawk. c. 10, s. 34, 1 Ventr. 336. They are punishable for non-feazance, and *à fortiori* for misfeazance, Lamb. *49, 3 Burn's Just.; [*630] and so are all public officers who have a trust, in the case of a misfeazance, 8 Mod. 326, 2 Burr. 803, 864, 3 Burr. 1335, 1439, 4 Burr. 2106, 2494, 1 Ventr. 49, 2 Ld. Raym. 1379; the duty of conservators or wardens of the peace in their respective wards is exactly the same as that of constables, Cromp. 6, 2 Hawk. ch. 8, s. 11, 3 Burn's Just. Next as justices: The present defendants in their certificate state themselves to act as justices; and it appears that as such they very early had jurisdiction over highways. How or when the practice of their making such certificates originated does not exactly appear; but it is certainly of great antiquity, and has been recognised at all times of which there is any account of it by the Court. The Statute of Winton, c. 6, seems still in force as to highways; that statute is by 2 Ed. III. c. 6, made an article of the peace, and justices are assigned commissioners with power of inquiring and also of punishment. Hence they were as to highways a Court of Record, 1 Ld. Raym. 467, 8 Co. 38 b, 60 b; and their acts are not traversable, 12 Co. 24, 4 Mod. 38, Keilw. 34 a. The stat. 5 Eliz. c. 13, gave the traverse; and even after that statute, until the case of the justices of Wilts, 3 Burr. 1530, it was considered in general that the presentment of a justice as to the non-repair of a highway was not traversable generally as to the fact of non-repair; but merely as to the defendant's liability. And it is remarkable that the words of that statute are "presented, found, and adjudged," which latter word is omitted in the 13 Geo. III.

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c. 78. If the justices form a Court of Record in this respect, even examinations taken before them are admissible in evidence, 2 Hale, 285; *à fortiori* their certificates which are their judgments, would be admissible at least, if not conclusive, before any other Court of Record, Gilb. L. of Evid. 51, 1 Ld. Raym. 467. And this by analogy to the case of certificates from other Courts having competent jurisdiction, which are always received by each other, in their mutual communications: as certificates of administration granted from the ecclesiastical Courts, Bull. N. P. 246; of marriage from the Bishop, Cro. Car. 351; from the Courts in Wales as to their practice, Cro. Eliz. 503; of the customs of London from the Mayor and Aldermen by their recorder, 1 Burr. 251; an exemplification of a decree in Chancery, 2 Mod. 231; a certificate from the commissioners appointed by statute to state the debts of the army, 1 Stra. 481; of a sentence in a cause of marriage, 2 Stra. 960, Gilb. L. of Evid. 54. So certificates of [*631] forcible entries and riots, 3 Burn's Just. Dalt. *ch. 44, 2 Rol. Rep. 39. The judgment at common law upon every indictment for non-repair of a highway was a fine for the offence and a *distringas* to remove the nuisance; and then the party caused a *constat* to issue to the sheriff who made a return to it that the way was repaired, 1 Hawk. ch. 76, s. 94, Salk. 358, Sir T. Raym. 215. And it is said in the books that the matter is not at an end by the fine, but writs of *distringas* shall be awarded *in infinitum* till the Court are certified that the way is repaired; and therefore the judgment of *distringas* is not essential if the Court are duly informed that such process is unnecessary, 1 Stra. 688. The fine therefore was originally for the offence, though applied to a particular purpose by the 13 Geo. III. c. 78, namely to the reparation of the road, but the *distringas* shall still go to remove the nuisance. From hence it appears that the practice of receiving certificates from magistrates originated from the nature of the judgment in such cases; and they appear to have been always admitted by the Court as evidence to regulate their judgment in setting the fine, and to prevent the necessity of issuing the *distringas*. In *Nottingham's* case, 2 Rol. Rep. 412, the Court refused to quash an indictment for not repairing a road without a certificate. So in *Leyton's* case, Cro. Car. 584; *Randall's* case,

1 Keb. 256; *Anonym.* ib. 291; *R.* v. *Shelderton*, 2 Keb. 221. In the case of *The Inhabitants of Mile End*, Sty. 163, an indictment was quashed on reading a certificate of the way being repaired. In *R.* v. *Cluworth*, Salk. 359, the Court said that writs of *distringas* should be awarded *in infinitum* till they were certified that the way was repaired. The case of *R.* v. *The Inhabitants of Glaston*, 2 Keb. 728, recognizes the same practice; and in Sir T. Ray. 215, it is expressly declared to be the course of the Court upon an indictment for a nuisance in a highway that the offender is admitted to a fine upon his submission before verdict if there be a certificate that the way is repaired. In the same manner, orders certificates and convictions of magistrates on view are not traversable when they act under the 13 Geo. III. c. 78, s. 19, 25, and 76, as to highways. The act of granting certificates therefore in this case being shown to be of judicial cognizance, it follows necessarily that the defendants are indictable for conspiring to do such an act from corrupt motives, Moor. 628; 2 T. R. 190. And this, whether they are to be considered in this respect as justices of record, Lamb. 66, 631; 1 Leon. 295; Salk. 396; 1 Stra. 69; 2 Ld. Ray. 766; or merely as officers entrusted with the king's commission, and having jurisdiction over the *subject matter of their certificate, Cro. Jac. 65. Indeed as [*632] public officers acting under an oath, any corrupt act done by them *colore officii*, whether they have jurisdiction or not, is a high offence against public justice, 4 Blac. Com. 141. And any conspiring by individuals whether in a public or private capacity, or any act done by any person for the purpose of imposing upon a court of justice, must upon the same principle be indictable at common law.

In the present Term:

Erskine and *Shepherd*, Serjt. were heard in support of the rule to arrest the judgment. 1st, This is not such an act for conspiring to do which an indictment will lie. 2dly, The conspiracy is not properly charged. 3dly, By the acquittal of the other two defendants no judgment as for a conspiracy can be given on this record. 4thly, The Sessions had no jurisdiction as to those counts which charge a conspiracy. 5thly, The other counts which do not charge a conspiracy

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do not set forth any offence which is a breach of the peace; and consequently it is not within the jurisdiction of the Court of Quarter Sessions where this indictment was preferred. 1st. It is not an indictable offence, because the making of this certificate could not lead to any legal consequence. The certificate, when offered, was not binding on the Court, not being on oath, nor legal evidence of any fact in judgment before them. It is clear that the practice of granting such certificates could not have originated out of the common law, because the office of justice was itself created by statute; and no statute can be referred to giving them this power. Even if such a power had been conferred by some ancient statute yet as all prior statutes relating to the highways are repealed by the general laws of the 7 Geo. III. c. 42, and 13 Geo. III. c. 78, and the power of granting such certificates is not continued, of course no such power can exist at this day. This will appear more strongly from the 19 sect. of the 13 Geo. III. which enables the justices to grant a certificate for a different purpose from that set out on this record; and *expressio unius est exclusio alterius*. Yet supposing a power of granting such certificates to be attached to them as conservators of the peace, still it would be impossible to admit that they had a power of suspending the judgment of a superior court. This distinguishes the present cases from all those which have been cited, where an indictment for conspiring to do an act otherwise legal in itself has been held to lie; for in all those cases the act tended to the [*633] prejudice *of another by its necessary effect. Now if the certificate has no effect in law, by which only it can be said to operate (if at all,) the conspiracy charged is no more than a conspiracy to do a nugatory act from whence no evil consequence can be deduced, and therefore such a conspiracy can be no offence in law. The cases which have been cited to prove the legal operation of a certificate as acknowledged by the practice of the Court are for the most part cases upon motion to quash an indictment; and that being an application to the discretion of the Court, they have admitted this mode of ascertaining the fact of the road being sufficiently repaired out of courtesy to the magistrates, and to save the parties the expense of trying

the question when the object of the prosecution has been already attained. But it is no more than a matter of courtesy, and is not binding on the discretion, much less on the judgment, of the Court. The note in Sir Thomas Raymond, is the only authority which expressly recognizes the usage; but even that does not go to the length of asserting the legal authority of the justices to do such an act. 2dly, The conspiracy is not properly charged; for it does not appear that the justices knew that the road was out of repair at the time when the conspiracy is alleged; the indictment only states that they knew it to be so at the time when the certificate was produced in evidence. The criminal mind should be shewn to exist at the time when the crime was committed. The crime charged is not the production of the certificate, but the conspiracy to produce it; and therefore the averment of knowledge of the road's being out of repair should be extended to the time when the conspiracy is charged. *Non constat* that at the time of the conspiracy they knew that the road was out of repair, though they might know it afterwards. This objection applies to the 1st, 3rd, and 5th counts. 3rdly, The acquittal of the other two defendants, who are stated on the record to have been inhabitants of the parish where this road is situated, precludes the giving judgment against the magistrates who are convicted. The two magistrates being appointed by law to do the act in question, (supposing them to have such a right,) cannot be charged with conspiring to do it with each other, though they might be indicted for so conspiring with a third person: for a conspiracy implies an illegal concert in doing the act, which cannot apply to those whom the law authorises and requires to act together on such an occasion. But if they do the act from corrupt motives, an indictment will lie against them for corruptly acting, but not *for a conspiracy, because the law [*634] recognizes their combining to do the act imputed to them. Besides, as it now appears upon the face of the record that the persons for whose benefit the act is supposed to have been done, and who may be considered as the principals, are acquitted, it is incongruous to give judgment against those who at most are in the nature of accessaries to the other two. 4thly. Although the Sessions have jurisdiction over conspiracies, yet they must be

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confined to such as in their nature tend to a breach of the peace. And 5thly, the same objection applies to the 2nd and 4th counts, which not charging any offence amounting to a breach of the peace, or having a tendency thereto, the Sessions had no jurisdiction ; and no authority can be shewn for thus far extending the jurisdiction of that Court.

On a former day in this Term the following opinions were delivered by the Court on the rule to arrest the judgment :

LORD KENYON, Ch. J.:

Notwithstanding the arguments that have been urged on behalf of the defendants, it appears to me that the conspiracy is sufficiently charged in the indictment. The first count alleges that, pending the prosecution against the inhabitants of the parish of Windlesham for not repairing a road, these two defendants together with two other persons conspired to obstruct the due course of justice, that after the parish had pleaded Not guilty and before they had withdrawn that plea, the defendants conspired and agreed to produce in evidence a certain paper-writing as and for a true certificate under the hands and seals of these two defendants as justices, stating that the road was in repair, that afterwards in pursuance of this conspiracy they produced to the Court, &c. the said paper-writing as and for a true certificate, but that in truth the road was out of repair, and so the defendants knew at the time of producing it in evidence. It has been ingeniously argued that the indictment should have alleged that at the time of the conspiracy the defendants knew that the road was out of repair. But I think that they should have known that the road was in repair before they agreed to certify that it was so. If at that time they did not know whether or not the road was in repair, and yet agreed to certify to the Court that it was, that is sufficient to constitute the delinquency of the defendants. Therefore it seems to me that the conspiracy is properly charged in the indictment.

I cannot adopt the argument used by the defendant's counsel [*635] that these two defendants were not competent to conspire, *on the ground that this must be taken only to be the act of one person.

It is widely different from the instance put of husband and wife, to which it was compared, where the wife is not supposed to have an opinion of her own: but here neither of these magistrates was so subjected to the other as to be incapable of judging and acting for himself; they were free agents, independent the one on the other, and consequently were in a condition to conspire.

Another objection was that it does not belong to the situation of these defendants as justices to certify that the road was in repair, and that such a certificate is not a legal instrument of which a court of law can take cognizance. How or when these certificates originated it may perhaps be difficult to ascertain; but it is not necessary now to trace their origin. The practice of receiving these certificates is now become too inveterate to be overturned. Perhaps they are received as coming from persons who are considered in the law *fide digni;* though I am not sure that it would not be an indictable offence in other persons, not justices of the peace, to take upon themselves to make a false certificate under an agreement and conspiracy to mislead a court by giving them false information. I admit that it is a voluntary act in the magistrates to certify; but if they do undertake to make a certificate, they ought to know that its contents are true. Therefore on the best consideration that I have been able to give to the case, I am of opinion that this is an indictable offence, and that it is sufficiently charged in the indictment.

ASHHURST, J.:

The practice of receiving certificates signed by magistrates respecting highways is very general, and of ancient date. I can speak to this practice ever since I have known the profession; and a practice that has been recognized in courts of law for such a length of time would go a great way to convince me that it was a legal practice: but this does not rest merely on the practice which has obtained; the authorities referred to in support of the prosecution carry the point still farther. Then the principal question is whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which

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the lives and properties of all the subjects depend. And with regard to the manner in which the conspiracy is charged in the indictment, I think that all the requisites are sufficiently alleged.

[636] GROSE, J.:

I agree with the counsel for the defendants that in order to constitute a conspiracy more than one person must be concerned. It is said however that these two defendants are to be considered only as one person: but it might as well be said that, if all the justices of the county had agreed to do the thing that was done in this case, it might be taken to be only the act of one person. Another objection was, that it was not stated in the indictment that the defendants knew at the time of the conspiracy that the road was out of repair: I do not think that that is the gist of the offence; for if two persons, with an intent to obstruct the course of justice, conspire to state a fact at all events as true, which they do not know to be true, it is criminal; they are bound to know that the fact is true which they agree to certify as such. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.* It is laid down in some of the cases, that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the Court by misrepresentation is equally criminal. Now we find that as far as can be traced it has been usual for the judges, before they assess a fine on a parish for not repairing a road, to inquire into the actual state of the road, and to receive a certificate of magistrates for that purpose. This was the course of the Court in the time of Charles II., as appears in Sir T. Raym. 215; and if the course of the Court, it must have

* This *dictum* was questioned by Lord CAMPBELL, C. J., in *Hilton* v. *Eckersley* (1855) 6 E. & B. 47, 62. And now the contrary is expressly laid down by statute 38 & 39 Vict. c. 86, s. 3.—R. C.

been the law of the Court. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice, it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true.

LAWRENCE, J.:

The objections made on the part of the defendants may be reduced to two: 1st, That the indictment has not sufficiently charged a conspiracy by the defendants; 2ndly, That if properly charged in point of form, it is not a *charge of such an act as can [*637] have any effect, and therefore that it is not criminal to conspire to do that act. The answer that has been already given to the first is decisive. It is not necessary that the defendants should have known that the road was out of repair. They are charged with conspiring to pervert the course of justice by producing in evidence a certificate that the road was in repair; and if this charge be established in fact, it is an offence of considerable magnitude against the administration of the justice of the country. This is not unlike the case of perjury, where a man swears to a particular fact without knowing at the time whether the fact be true or false; it is as much perjury as if he knew the fact to be false, and equally indictable. Then the next question is, Whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the Court at the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads has existed as far as the memory of living persons extends; and the books carry it still farther back. In the reign of Charles I., in *Leyton's* case, it appears that a certificate of some kind was in use; and the case of *R.* v. *Randall* in 1 Keble, 256, shews that it was a certificate by justices of the peace "else the justices must certify that it is no encroachment." It

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was said in answer, that all the cases on this point, except that in Sir T. Raymond, were applications to the favour of the Court in a summary way to quash the indictment: but in addition to the case in Sir T. Raymond there is another in 6 Mod. 163, where after verdict "the Court, before they would set a fine, would be certified by some of the justices of the peace of the neighbourhood that the way was sufficiently repaired; which they did." I have not been able to discover how or when the practice of receiving these certificates arose: but a practice that has been adopted in the Courts at least as long back as the reign of Charles I. goes a great way to shew what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received;† the customs of London are certified by the Recorder; ‡ so formerly were *certificates received from the captain of Calais; § and in Cro. Eliz. 502, 3, this Court said they would give credit to the certificate of the judges in Wales respecting the practice of their Court, and that the custom of a Court is a law in that Court.

[*638]

Rule to arrest the judgment discharged.

1796.
April 27.

[642]

HOWARD *v.* CASTLE.

(6 T. R. 642—645.)

If the owner of goods or an estate put up to sale at an auction, employ puffers to bid for him, without declaring it, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract.‖

In this action on the case the declaration stated that the plaintiff was possessed of a leasehold estate which on the 23rd of March, 1795, she put up to sale by auction on certain conditions, among which were the following: That the highest bidder should be the purchaser; that the purchaser should at the sale pay 25*l.* per cent. into the hands of the auctioneer, and sign an agreement to pay the remainder before the 31st of March; and that if the purchaser should neglect to comply with the conditions the

† *Vid.* Co. Lit. 74, a; 9 Rep. 31, b.
‡ *Ib.*
§ 9 Rep. 31 b.
‖ See now, as to sales of land, 30 & 31 Vict. c. 48.—R. C.

deposit money should be forfeited, the plaintiff should be at liberty to re-sell the premises, and the defendant should make good any deficiencies attending the re-sale with costs. It then stated that the defendant was the highest bidder at the sum of 357*l.* yet that he had *refused to pay the deposit or to complete the purchase; that afterwards on the 10th of April, 1795, the plaintiff again put up the premises to sale by public auction, when they were sold for 273*l.*; that the deficiency, together with the costs and the deposit-money which the defendant ought to have paid at the first sale, amounted to 200*l.* 14*s.*, yet that the defendant had not paid, &c. [*643]

At the last Middlesex sittings before Lord Kenyon it appeared that at the first sale at which the defendant was declared the purchaser there was no other real bidder, but that all the other bidders were puffers employed by the plaintiff; that the defendant on discovering this refused to complete the contract; that at the second sale there was one real bidder, of the name of Gander, who offered 270*l.* and that at that sale the premises were bought in for the plaintiff at 273*l.* For the defendant it was objected, on the authority of *Bexwell* v. *Christie*, Cowp. 395, that as all the other bidders at the first auction were puffers employed by the plaintiff, the whole was a fraud and imposition on the defendant, and that he was not bound to complete his contract. Lord KENYON was strongly inclined to be of this opinion, but in order to prevent the expense of another trial his Lordship directed the jury to assess the damages for the plaintiff, and reserved the point of law for the opinion of this Court. The jury gave a verdict for the plaintiff with 10*l.* 15*s* damages; and a motion having been made on a former day in this term to set aside the verdict and to enter a nonsuit, that rule was now opposed by

Erskine and *Morgan:*

First, there was no fraud in this case, neither was the defendant imposed upon in the sale. If indeed by means of any contrivance of the plaintiff's, the defendant had been induced to offer more than the real worth, the transaction might have been avoided on the ground of fraud: but there was no evidence of

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any such collusion. The case of *Bexwell* v. *Christie* is very distinguishable from the present; there the whole turned on the question, Whether or not the auctioneer had exceeded his authority; the person to whom the horse was delivered in that case was really the highest bidder, and according to the declared terms of the sale the auctioneer against whom the action was brought by the owner acted properly in delivering the horse to him, the owner not having publicly made known his intention that the horse should not be sold under a certain sum; and the general reasoning of Lord MANSFIELD in that case must be taken [*644] with reference to the facts before him. *Secondly, whatever may have been the case formerly, the practice of employing puffers at auctions has been sanctioned by the Legislature in three different Acts of Parliament passed since the case in Cowper; for those statutes, imposing a duty on goods, &c. sold by auction, except goods, &c. bought in by the purchaser, or by any other person in his behalf. 17 Geo. III. c. 50, s. 10; 19 Geo. III. c. 56, s. 12; and 28 Geo. III. c. 37, s. 20.

Mingay and *Lawes*, in support of the rule, were stopped by the Court.

LORD KENYON, Ch. J.:

In considering the nature of the plaintiff's demand it becomes necessary to inquire what brought the different persons together at the auction, and on what terms they met when they went there to bid. The plaintiff's estate was advertised to be sold by auction, and one of the conditions of sale was that the highest bidder should become the purchaser; it was to be presumed also that no fraud was to be practised on those who were present to induce them to bid more than they were inclined to offer. At this sale the defendant bid a certain sum, and afterwards refused to complete his purchase. Now if there were no fraud in this transaction, the plaintiff has a right to call on the defendant, in a court of justice, for a satisfaction for non-performance of the agreement. But it appeared at the trial that the whole transaction was bottomed in fraud: it was fraud from the beginning to the end; the parties did not meet on equal terms; several other persons

besides the defendant bid, who represented themselves as embarking on their own judgment: but it afterwards turned out that this was false, and that this was an imposition practised by the plaintiff on the defendant, for all those other persons were authorised by the plaintiff to bid for him. I will not go into the general reasoning on this subject, because it is very ably stated by Lord MANSFIELD in the case alluded to. Only part of that reasoning has now been adverted to by the plaintiff's counsel, but the rest of it is applicable to this case. The whole of that reasoning is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man. The Acts of Parliament that have been referred to did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. In the case cited Lord MANSFIELD mentioned an instance in which the owner may legally and fairly bid at the auction, namely, where before the bidding begins he gives public *notice [*645] of his intention; and in such a case no duty is to be paid under the Acts of Parliament that have been referred to. The circumstance of puffers bidding at auctions has been always complained of; if the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord MANSFIELD'S comprehensive mind saw it in its true colours, as founded in fraud; he met the question fairly, and made a precedent which I am happy to follow.

ASHHURST, J.:

If one person is induced to bid at an auction without exercising his own judgment, and that too by the act of the owner himself, the parties do not meet on equal terms. This seems to be a manifest fraud on the defendant; and I think that this case is governed by that in Cowper.

GROSE, J.:

Nothing can be more wise than the doctrine laid down in the case of *Bexwell* v. *Christie*, which is not in the least impeached by the Acts of Parliament alluded to. If the owner of goods put up to sale at an auction wishes that they shall not be sold under a

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particular price, he may declare so before the auction begins, or he may reserve one bidding for himself, or declare that he has appointed a particular person to bid for him: in either of those cases the parties meet on fair terms. But the whole of this was a secret transaction unknown to the defendant, and it was a fraud and imposition upon him.

Rule absolute.

1796.
April 29.
[650]

BULLOCK *v.* DOMMITT.

(6 T. R. 650—651.)

A lessee of a house, who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire.

THIS was an action of covenant in a lease of a house, &c. against the defendant as assignee of Carbill, the lessee: and two breaches were assigned, one for non-payment of 6*l.* for half a year's rent due 29th September, 1795; the other for not repairing. In the covenant to repair there was no exception, but the lessee covenanted that he his executors administrators and assigns would during the term of twenty-one years when where and as often as need or occasion should be and require at his and their own costs and charges repair uphold support maintain amend and keep the said messuage and premises in needful and necessary repair, &c. The defendant to the first breach pleaded payment, on which issue was joined; and to the second, that on the 20th of September, 1794, the house was by accident and against the will and without the default of the defendant or his servants or family, namely by means of a fire which accidentally broke out in an adjoining house, and communicated from that to the house in question, burned down and destroyed and has not since been rebuilt, &c. To this plea there was a general demurrer, and joinder in demurrer.

Shepherd, Serjt. in support of the demurrer:

Where there is a general covenant to repair without any exception, the lessee is bound to repair and rebuild though the house be destroyed by fire. In *Paradise* v. *Jane*,* where to an

* All. 27.

action of covenant for non-payment of rent the defendant pleaded that a foreign enemy dispossessed him of the estate, the Court determined that the plea was insufficient, and said, "If the lessee covenant to repair a house, though it be burned *down by lightning, or thrown down by enemies, yet he ought to repair it;" and Dy. 33, a, is there cited; where the Court took a distinction between a covenant to repair under a penalty and a covenant for non-performance, &c.; saying that the lessee is excused from the former by the act of God, as by thunder or tempest, but not from the latter. But this precise case was determined in Com. Rep. 626, *The Earl of Chesterfield* v. *The Duke of Bolton:* that was an action of covenant for not repairing, on a general covenant like the present, to which the defendant pleaded (as here) that the house was burned down by accident, yet it was held that the lessee was bound to rebuild, and the Court gave judgment for the plaintiff on demurrer.

Wood, who was to have argued for the defendant, acknowledged that this could not fairly be distinguished from the last case, and that the judgment of the Court must be in favour of the plaintiff, if they were of opinion that that case was law.

LORD KENYON, Ch. J.:

The cases cited on behalf of the plaintiff have always been considered and acted upon as law. In the year 1754 a great fire broke out in Lincoln's Inn, and consumed many of the chambers, and among the rest those rented by Mr. Wilbraham; and he, after taking the opinions of his professional friends, found it necessary to rebuild them. On a general covenant like the present, there is no doubt but that the lessee is bound to rebuild in case of an accidental fire; the common opinion of mankind confirms this, for in many cases an exception of accidents by fire is cautiously introduced into the lease to protect the lessee.

GROSE, J.:

I believe that the liability of the tenant in cases like the present was the occasion of introducing an exception in many cases. This liability of the tenant is founded on the old

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law; it is so laid down in Bro. Covenant, pl. 4; referring to 40 Ed. III. 5. So in *Walton* v. *Waterhouse*, reported in 2 Saund. 420, and 3 Keb. 40, it was taken to be law by HALE, Ch. J. and the whole Court; and though Saunders, who drew the plea and argued the case on behalf of the defendant, was dissatisfied with the Court, it was not because the Court held that under such a covenant the lessee was bound to rebuild, but merely because he thought they had not considered whether the plea were good or not in form; the defendant having pleaded that the house was rebuilt, without saying by whom; and the plaintiff himself having in fact rebuilt it.

Judgment for the plaintiff.

1796.
April 30.
[653]

THE KING *v.* THE INHABITANTS OF HEATON NORRIS.

(6 T. R. 653—654.)

The place of birth is *primâ facie* the place of settlement.*

Two justices removed Ann the wife of Benjamin Lomax, a soldier, and her three children from Heaton Norris in Lancashire to Beard in Derbyshire: the Sessions, on appeal, quashed the order, and stated a case for the opinion of this Court. The respondents rested their case on the birth settlement of B. Lomax in Beard, proving that he was born there. It appeared also from the evidence given by the respondents that his father had come to reside in Beard only two years before Benjamin was born, an entire stranger to the place, neither he or any part of his family having been at Beard before, nor having had any property or connexion in the place; and that he came from Bolton in Lancashire, where he had been many years the occupier of a public house. And it was not proved that any inquiry had been made by the respondents respecting the father's settlement.

[654] *Topping*, who was to have argued in support of the order of

* Followed in *Headington Guardians* v. *Ipswich Guardians* (1890) 24 Q. B. D. 414, 419; affirmed 25 Q. B. D. 143, 59 L. J. M. C. 92.—R. C.

Sessions, acknowledged that after the determination in *R.* v. *Woodford*, Hil. 23 Geo. III.,† and *R.* v. *Whixley*, H. 26 Geo. III.‡ he could not dispute but that the place of the birth of the pauper's husband was *primâ facie* the place of his settlement. And

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The COURT being of this opinion,

Quashed the order of Sessions.

Scarlett was to have argued on the other side.

BRUCKER *v.* FROMONT.

(6 T. R. 659—662.)

1796. *May* 1.

[659]

A declaration which charges the defendant with having negligently driven his cart against plaintiff's horse is supported by evidence that defendant's servant drove the cart.

THE plaintiff declared against the defendant for that he on such a day was driving a cart and horse along the king's highway, and that he so carelessly, negligently, and improvidently guided, drove, and directed the same that the cart for want of due care and caution of the defendant in that behalf was violently forced and driven and run against the plaintiff's horse then passing, and drawing the plaintiff's chariot along the said highway, whereby the shaft of the defendant's cart was forced into the body of the plaintiff's horse and killed it.

The fact was that the defendant's servant was driving the cart at the time when the accident happened, and the defendant himself was not present. Whereupon it was objected by the defendant's counsel at the trial that the action was *misconceived, [*660] as it ought to have stated not that the defendant himself had done the act, but that it had been done by the act of his servant; and Mr. Baron THOMPSON before whom it was tried at the last assizes for Berkshire, nonsuited the plaintiff. A rule having been obtained to shew cause why the nonsuit should not be set aside, and a new trial granted,

† 2 Const's Bott. 16, pl. 35. ‡ Ib. 17, pl. 36.

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Plumer and *Milles* shewed cause; contending that the master was not liable for the act of his servant under this general form of declaring, which was not conformable to the generality of precedents, nor warranted by any express decision. * * *

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Williams, Serjt. and *Russell*, after mentioning the case of *Turberville* v. *Stampe* † to shew that this mode of declaring was *considered in Lord Holt's time as the proper form, where an action is brought against the master for the negligence of the servant, upon the principle that it is sufficient to declare upon the legal effect of any act, were stopped by the Court.

LORD KENYON, Ch. J.:

On reason and on principle I should have been inclined to support the decision at *nisi prius*, because it is most convenient to state the real cause of action on the record. But I cannot distinguish this case from that cited from Lord Raymond's Reports; nor am I equal to the task of overturning a precedent that was considered by Lord HOLT and the Court as a good one.

ASHHURST, J.:

I think it may be stated in the declaration either way, though it is certainly most convenient to state the fact as it really happened.

GROSE, J.:

The use of a declaration is to inform the defendant of every thing that the plaintiff intends to prove, and that the defendant is called upon to answer; and on looking at this declaration the defendant could not know that the action was brought against him for the act of his servant; but I cannot get rid of the authority of the case that has been mentioned.

LAWRENCE, J. of the same opinion.

On the next day *Plumer* mentioned this case again; ob-

† 1 Ld. Raym. 264; 3 Ld. Raym. 375; Skin. 681; Carth. 425; Salk. 13 S.C.

serving that the case of *Turberville* v. *Stampe*, on the authority of which alone he understood the Court had granted a new trial, did not apply to this case, because there the question was not, whether the facts proved supported the declaration, but whether the declaration itself was good, it being an action on the custom of the realm against the defendant for negligently keeping his fire, and it was stated in the declaration that the fire was on a close of heath and not in the defendant's house. But

LORD KENYON, Ch. J. said:

The ground on which that case influenced my opinion was, that that precedent was at that time considered as a good one.

Rule absolute.

PORTER *v.* SHEPHARD.

1796. *May* 3.

IN ERROR.

[665]

(6 T. R. 665—671.)

[THIS was a question of construction, depending upon the special terms of a lease. The following general observation of Lord KENYON has however been quoted as an authority.] *

LORD KENYON, Ch. J.: [668]

* * It has frequently been said, and common sense seems to justify it, that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument, and that technical words (if there be any to encounter such intention, and there are none in this case,) should give way to that intention. * *

* In *Roberts* v. *Brett*, 11 H. L. C. 354; see also per Lord BLACKBURN, *London Guarantee Co.* v. *Fearnley*, 5 App. Cas. at p. 917.—R. C.

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May 3.
[671]

JOHN THOMAS, ON THE SEVERAL DEMISES OF LLEWELLYN EVANS AND ELINOR HIS WIFE, J. WILLIAM AND ELIZABETH HIS WIFE, R. DAVIES AND MARY HIS WIFE, GEORGE THOMAS AND WILLIAM DAVIES, *v.* MARY THOMAS AN INFANT, BY D. EVANS HER GUARDIAN, AND ANOTHER.

(6 T. R. 671—679.)

A testator devised an estate to his "grand-daughter, Mary Thomas, of X., in the parish of Y." On the evidence it appeared that at the time of his death (and of the making of the will), there was a grand-daughter living at X., in the parish of Y., but her name was Elinor Evans; and there was a great grand-daughter, Mary Thomas (who was an infant of two years), living in the parish of Z., some miles from Y. On this evidence it was held to be uncertain which of the two was intended, and the devise was held void as against the heir at law.

THIS was an ejectment tried at the last spring assizes for Hereford to recover a house known by the name of the Star Inn, in Water Street, in the Borough of Caermarthen, of which one George Evans died seised in fee in April, 1779, having duly made his will in his last illness whereby after several devises of land and the profits of land to his grandson George Thomas, his grand-daughter Anne Harry, his grandson William Davies, and his three younger grandchildren of Wainllanne respectively, he proceeds thus: "Item, I give to my four daughters, Margaret, Anne, Mary, and Elizabeth, one shilling each. Item, I give to my three grandchildren of Llanteway, Anne, Elizabeth and Elinor, 40*l.* each. Item, I give to my grand-daughter Elinor Evans of Merthyr parish 40*l.* Item, I devise to my grand-daughter, Mary Thomas, of Llechlloyd in Merthyr Parish, the reversion of the house in Water Street, (the premises in question), the said house being to continue in the possession of my wife Elizabeth Evans, during her widowhood." Then follows the appointment of his executors. At the time of his death the devisor had a grand-daughter of the name of Elinor Evans, one of the lessors of the plaintiff, who lived at Llechlloyd in Merthyr parish, and a great grand-daughter Mary Thomas, the defendant, an infant, of about the age of two years, the grand-daughter of his eldest daughter Margaret by her second husband John

Thomas, being the only person of that name in the family; but it appeared that she lived at Green-castle, in the parish of Llangain, some miles from Merthyr parish, in which latter parish she had never been in her life. The other lessors of the plaintiff were the heirs at law of *the devisor. At the trial the plaintiff's counsel proposed giving parol evidence to shew a mistake in the name of the devisee; that when the will was read over to the devisor by a Mr. Phillips, who drew it, and who is since dead, the devisor said that there was a mistake in the name of the woman to whom the house was given; that Phillips then said he would rectify it, but the devisor answered that there was no occasion, as the place of abode and the parish would be sufficient. To this evidence the defendant's counsel objected, contending that there was not that *ambiguitas latens* which authorised the receiving of parol evidence. That if the doubt had arisen from there being two persons of the name of Mary Thomas, parol evidence might be admitted to explain which of them was meant; but that here the inaccuracy of the description was not such as to raise a sufficient degree of doubt to let in the parol evidence, for grand-daughter would properly enough signify great grand-daughter; and the mistake of the residence was only in a matter of description which was perpetually varying, and could not raise any doubt where a name not applicable to any other than the defendant was used, which is a circumstance of the greatest weight in these cases. But LAWRENCE, J. received the evidence, subject to the opinion of the Court on its admissibility in case the jury should be of opinion that the name Mary Thomas had by mistake been inserted instead of Elinor Evans; but the jury being of opinion that there was no such mistake, they were directed to find for the defendant on the first count, laying the demise from Elinor Evans and her husband, which they accordingly did: and consequently any further consideration of this point became unnecessary. The defendant's counsel then offered evidence of declarations made by the devisor at other times previous to the making of his will, expressive of his regard for his great grand-daughter the defendant, and of his intention of giving her the Star in Water Street. This evidence was rejected by the learned judge, who thought that nothing

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dehors the will could be received to shew the intention of the devisor, which could only be collected from the words of the will itself, after the removal of any latent ambiguity there might be in the description of persons or other terms made use of in the will. And the jury, under his direction, found for the plaintiff on the several counts which were on the demises of the heirs at law, on the ground that the devise was void for uncertainty; the defendant having liberty to move the Court to enter a nonsuit if [*678] they should be of a different opinion, *and should think that the great grand-daughter Mary Thomas might take under the will. And a rule to shew cause having been obtained to that purpose.

Williams, Serjt. and *Bragge* now shewed cause:

The rule that *falsa demonstratio non nocet*, or as it is expressed in Lord Bacon's Max. Reg. 25, *veritas nominis tollit errorem demonstrationis*, does not apply here; for that maxim only applies to cases where, notwithstanding the false demonstration, there is no doubt of the person intended to be preferred, and where there is no other person answering the description given. Such is the case mentioned in Com. Dig. tit. Devise (J.) of a devise to Bevil Grenville, second son of my second brother, who is my godson and bears my father's name; there B. G. took though he was the second son of Bernard Grenville, who was the second son of the second brother of the testatrix. Now though it may be admitted that more weight is to be given to the certainty of the name than to the certainty of the description, and that the irrelevancy of the latter may be often rejected, and though even a mistake in the name will not always avoid the devise, as in *Pitcairne* v. *Brase* and others,† yet in all such cases the real object of the devise was clearly ascertained, and the false demonstration or description did not, as in this case, apply to any other specific person, so as to leave it in doubt who was really meant. 1 Atk. 410. Lord Bacon says, commenting on his 13th maxim,‡ that though falsity of addition or demonstration does not hurt where you give the thing a proper name, yet if it stand doubtful on the words, whether they import a false reference or demonstration, &c. the law will never intend error or falsehood. (Many passages

† Finch's Rep. 403. ‡ Page 76.

were cited from the books on the civil law, shewing in what cases the name, in what the description of the person or thing, should prevail, all of them grounded on the supposition that the intention was manifest notwithstanding the mistake.) In this case, if there had been no other person in the family answering the description annexed to the name of Mary Thomas, such description, though erroneous, might not perhaps have avoided the devise to her. But inasmuch as the description of granddaughter of Llechlloyd in Merthyr parish is directly applicable to another of the devisor's family, who was also an object of his bounty, it is impossible to determine with certainty whether the error lies in the name or in the description; and being both of them sensible, but applicable to *different persons, there is no reason [*674] why the one should be rejected more than the other. To reject the description as false, because it does not relate to the name, is begging the whole question; *et incivile est nisi tota sententia perspecta de aliquâ parte judicare*, Hob. 171. E. Evans cannot take, because her name is not used in the devise in question, but the name of another person is; neither can Mary Thomas take, because though her name is there inserted, yet a description of the person intended is annexed to it, which not only cannot apply to her as to the degree of relationship in which she stood to the devisor, but also in respect of her place of residence, and there is another person, namely, E. Evans, answering that description in both those particulars. If a man has two sons of the name of John, and he devises generally to his son John, evidence may be received to shew which he intended: but if there be no such evidence, the devise is void for uncertainty. *Lord Cheney's* case, 5 Co. 68. So in this case, as it appears uncertain whether the devisor intended to give the premises in question to the person named or to the person described, the devise is void, and the heirs at law are entitled to recover. As to the evidence offered of the devisor's declared intention to give the Star Inn to Mary Thomas, it was properly rejected, according to all the authorities on this subject. In *Ulrick* v. *Litchfield*,† Lord HARDWICKE rejected parol evidence that the testator intended to bequeath his personal estate to certain persons, because of the dangerous consequences

† 2 Atk. 372.

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which would result from letting in evidence of that nature: And he there observed that it was only admissible to rectify a mistake in a christian or surname, or where there were two of the same name, to ascertain which was intended, and in the case of a resulting trust relating to the personal estate. Lord Bacon also, in his comment on the 23rd maxim,† *ambiguitas verborum latens verificatione suppletur*, takes the distinction between an *ambiguitas patens* and an *ambiguitas latens*, and says that the former can never be helped by an averment.‡

Plumer, Milles, and *Dauncey, contrà:*

It is clear that Elinor Evans cannot take, she not being named in the devise in question, and the jury having negatived that the name of Mary Thomas was inserted by mistake instead of hers. Then the question is as between Mary Thomas and the heirs at law, which latter it is clear that the devisor meant to disinherit, [*675] whether by force of the erroneous description the devise to *Mary Thomas is rendered so uncertain, that the Court cannot see plainly that the intent of the devisor was that she should have the premises. The rule mentioned by Lord Bacon§ that *veritas nominis tollit errorem demonstrationis* applies to this case: and it is admitted that the name is of more weight and dignity than the demonstration; which is also confirmed by all the authorities cited from the civil law. One case put by Lord Bacon‖ is much stronger than the present; that if I grant land *episcopo nunc Londinensi qui me erudivit in pueritiâ*, this is a good grant though he never instructed me, and although it was the Bishop of Canterbury who instructed me. There the description applied most pointedly to another person, and yet the name was held to prevail. But the description in this case is not so inconsistent with the name as may at first appear; for the term granddaughter may be considered merely as descriptive of a lineal descendant from the devisor. In 2 Sid. 149, a case is mentioned in the 39 Eliz. where it was held that a grandson by a daughter might take under a devise to his son. So where there were grandfather, father, and son, and the father died, and the son

† Page 99.
‡ *Vid.* Sir T. Raym. 411, S. P.
§ Page 102.
‖ Page 106, 7.

gave lands to his father and his heirs; held that the grandfather should take. 8 Vin. Abr. 310, pl. 7. And it was lately held in the Exchequer that a grand-nephew might take under the description of nephew. As to the other part of the description of the place of abode, an error in so trifling a particular would certainly not avoid the devise if certain enough in other respects. Then the uncertainty is objected here, because of the application of the description to another person. But if it appear clearly that the devisor did not intend that that other person should take, then there is an end of the difficulty. And that appears, not only from the finding of the jury on the first count, but from the particular wording of the will itself. For the preceding bequest is to Elinor Evans, and if the subsequent devise had been also intended to her, it would either have been contained in the same clause, or at least there would have been some word of reference, as "also," or to the "said E. E.," as is to be found in other parts of the will. Besides, the descriptions annexed to the two several persons are different, the one being said to be of Merthyr parish; the other of Llechlloyd in Merthyr parish, which shews that the same person was not intended. 2ndly, as to the evidence rejected, although parol evidence cannot be received to contradict *a will, yet if it be consistent with, and only an explanation of, it, [*676] it may even according to the authority cited of 5 Co. 68: and here the name being right, and the uncertainty raised by the admission of parol evidence, the same species of evidence must on the same principle be admissible to clear the doubt, and support the words of the will.

LORD KENYON, Ch. J.:

Although great pains have been taken by the counsel on both sides to investigate the points in this cause, it seems to be a case of no difficulty. It must be admitted that the heirs at law are not to be disinherited by conjecture, but only by express words, or necessary implication. When the rule for a new trial was moved for, I alluded to the maxim that *falsa demonstratio non nocet*, but in doing so I wished that the sense of that rule should be attended to: I have always understood that such *falsa demonstratio* should be superadded to that which was sufficiently

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certain before; there must *constat de personâ*, and if to that an inapt description be added, though false, it will not avoid the devise. And this gets rid of almost all the observations and arguments made by the defendant's counsel; for in the cases cited there was no other person in competition with the person claiming. It has been a long established rule that where there is a latent ambiguity in a will the parties may go into extrinsic evidence to render that certain which without the aid of such evidence is uncertain. But here the evidence given has itself raised the ambiguity. On the face of the will there is no uncertainty; one person, namely, E. Evans, is named, who is the grand-daughter of the devisor and of Llechlloyd in Merthyr parish; two of the descriptions therefore in the contested devise apply to her; but instead of her name (it was said) that that of Mary Thomas was inserted; it turns out that Mary Thomas is not the grand-daughter, but the great grand-daughter of the devisor, and that she does not live at Llechlloyd in Merthyr parish, the place mentioned in this clause. Then do we arrive at any certainty respecting the person of the devisee? If we do, it must decide the case; but if the parol evidence has introduced uncertainty respecting the devisee, then the heirs at law must take. In addition to the cases that were cited, another in P. Williams † might have been referred to, where the name of the legatee was mistaken; the testator gave a legacy to Catharine; it turned out that there was a person whom he frequently called [*677] *Gatty and not according to her real name which was Gertrude; and when parol evidence of it was received, it left no doubt but that the testator meant Gatty. So here it was proper to let in the parol evidence to remove the latent ambiguity, but when received it leaves the question in uncertainty. If there had been no person answering the description of grand-daughter living at Llechlloyd in Merthyr parish, I should have rejected the description, and have said that the devise applied to Mary Thomas: but it appears that there is another person answering that part of the description, who is also an object of the testator's bounty. Then as there are two parts of the description not answering to Mary Thomas who is named in this clause in the will, we are left to

† *Vid. Beaumont* v. *Fell*, 2 P. Wms. 141.

conjecture who was meant by the devisor: but the law will not allow an heir at law to be disinherited by conjecture.

With regard to the other question respecting the rejection of evidence; it seems that the learned judge did right in rejecting it, the supposed declarations having been made by the testator long before the will was made; though had they been made at the time of making the will, I should have thought them admissible in evidence.*

ASHHURST, J.:

The heirs at law must recover the possession of this estate, unless some other person be clearly and unequivocally entitled to take under the will. I cannot form any satisfactory opinion respecting the person who the devisor intended should take under the devise in question, and therefore the title of the heirs at law must prevail.

GROSE J.:

The heirs at law cannot be disinherited unless we find some person named in the will that the devisor clearly intended should take: then can we clearly discover whom the devisor meant in the clause in question? He had no grand-daughter, but he had a great grand-daughter, of the name of Mary Thomas. And though under certain circumstances a great grand-daughter may take under a description of grand-daughter, if there be no doubt about the person intended, yet here the grand-daughter is described as living at Llechlloyd in Merthyr parish; this raises a considerable doubt respecting the person intended; and when it appears by the evidence given that the devisor had a grand-daughter living in that parish but no great grand-daughter, it renders it still more doubtful whether he meant to give the house

* This *dictum* is not now of any authority. It is clear, on the more recent authorities, that where the name of the legatee is that of one person, and the description is shown by evidence of surrounding circumstances to apply to another, extrinsic evidence by declarations of the testator as to his intention is alike inadmissible, whether by instructions at the time of, or by statements previous or subsequent to the making of the will. *Doe* v. *Hiscocks*, 5 M. & W. 369; *Charter* v. *Charter* (1874), L. R. 7 H. L. 364, 374, 43 L. J. P. 73, and cases cited by Lord Selborne, p. 383. —R. C.

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to Mary Thomas the grand-daughter. Then we are left to conjecture who was meant in this clause, there being no person answering to the descriptions; but it being uncertain, the heirs at law are *entitled to take the advantage. As to the rejection of the evidence offered; the question was what the devisor intended at the time of making his will, not what he had intended; and as the evidence tendered would only have proved that he had had such an intention, I think it was properly rejected.

LAWRENCE, J.:

I received parol evidence for one purpose and rejected it for another, on this ground; I thought that I could not receive parol evidence of declarations of the testator relative to his intention made before the will, but that parol evidence might be received to remove a latent ambiguity, not appearing on the face of the will, or to clear up a mistake of a name in the will.† As the description of the clause in question answered to E. Evans, and as it was stated that the devisor, at the time of making his will said that he meant that E. Evans should take under it, I permitted the counsel for the plaintiffs to go into parol evidence, to see whether or not the name of Mary Thomas were by mistake inserted for that of E. Evans. And in so doing I found myself warranted by former decisions; 8 Vin. Abr. 312, pl. 29; and 2 Ves. 216. With regard to the evidence which was rejected, I thought that a will could not be construed by any declarations made by the testator before the making of the will; but that his intention must be collected from the words of the will, or from what passed at the time of making it. There is no doubt but that the parol evidence to remove the latent ambiguity in the will was properly received; but when it was received, it became extremely doubtful who was intended to take. I perfectly agree in the opinion given by my Lord Chief Justice on this point: if the parol evidence had clearly shewn who was intended to take, that person would have been entitled to our judgment: but if the parol evidence does not remove but raises the doubt, then the title of the heirs at law must prevail. In many cases the description of the devisee is of importance; suppose a devise of

† See note p. 313.

a house to A. by name on condition that he keep up the house &c.; and it turned out that A. was of too tender an age to keep house, the person so named could not take, because it is evident from the description that the devisor did not mean that person so named. The cases cited only apply to a case where there is only one person respecting whom the ambiguity arises; if that had been the case here, if there had been no person answering the description in this clause, Mary Thomas who is named might have taken, and the description might have been rejected; but here the description, both as to the *degree of relationship and as to the place of residence, does apply to another person; therefore it is uncertain whom the devisor meant, and consequently the heirs at law must take. [*679]

Rule discharged.

BOYTER v. DODSWORTH.

(6 T. R. 681—683.)

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May 4.

[681]

Money given to A. and claimed by B. as perquisites of office cannot be recovered by B. in an action for money had and received, unless such perquisites be known and accustomed fees.

THIS was an action for money had and received, brought to recover back fees received by the defendant to the use of the plaintiff as belfry sexton and church sexton of the cathedral of Salisbury, and tried before Mr. J. Buller at the last Salisbury assizes. The plaintiff claimed under two patents in 1777 from the treasurer of the church, confirmed by the dean and chapter, granting to him for a valuable consideration the above offices for life. The one granted to him the office of belfry sexton "together with the right and full power of keeping keys to and for the doors of the said church, with free liberty of ingress egress and regress into and from the said church for cleansing shewing or otherwise officiating in the same." The other granted to him the office of church sexton "together with all fees wages and profits belonging, &c. in as large and ample a manner as S. C. (his predecessor) &c. had, &c." The plaintiff having proved these patents, and stated that the defendant had lately intruded into these offices, and had received several sums of money from

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strangers to whom the church had been shewn, BULLER, J. called on the plaintiff's counsel to prove that there were certain known and accustomed fees annexed to the offices, and that the defendant had received fees such as the legal officer *could himself recover in a court of law from the persons to whom the church was shewn. It being admitted that there were no such regular fees, but that it was usual for different persons to give what sums they pleased, the plaintiff was nonsuited.

A rule having been obtained on a former day, calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial granted;

Gibbs and *Burrough* were now to have shewn cause against it: but the Court called on

Dallas, *Jekyll*, and *Lens*, to support it:

The question here is, Whether the defendant, who intruded into these offices, is not bound in conscience to refund the money he received, and whether the plaintiff is not entitled to that money on principles of equity and natural justice, because if the latter be entitled to this money in equity, he may recover it in an action for money had and received. In *Moses* v. *Macfarlan*,† Lord MANSFIELD said, "If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case, as it were upon a contract." If the money received by the defendant had been paid as legal and acknowledged fees, it is admitted that this action might have been maintained. Then as between these parties the plaintiff is equally entitled; for whether the persons to whom the church was exhibited could or could not have been compelled to pay the money they did pay, yet when paid the plaintiff was in conscience and equity entitled to it, and the defendant who actually received it by means of his having intruded into the offices ought not to be permitted to avail himself of his own wrong. It is begging the question in this case to say that the sums paid to the defendant were mere gratuities, and that therefore the plaintiff cannot recover them from him;

† 2 Burr. 1008.

for whether the legal officer be entitled to more or less on a *quantum meruit* for his labour and trouble in shewing the church, in point of fact certain sums have been received by the defendant, and he cannot set up such a defence in an action brought against him to recover that money which he ought never to have received. Whenever an action is brought by the legal officer against any stranger to whom the church is shewn, it will be competent to him to make the objection that is now raised: but the *difficulty of ascertaining whether any or what sum can [*683] be legally claimed from such persons does not exist in the present case.

LORD KENYON, Ch. J:

There is no ground on which this action can be supported. If there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain; and the action for money had and received to recover fees has always been considered as being substituted in the place of an assize. But there is no pretence to say that an assize will lie for a gratuity, for money given which the party might have refused to give if he had pleased. And with regard to natural justice; the person who performs the duty is in justice entitled to the money given for such duty: here the defendant in fact performed the service, and on principles of natural justice he is entitled to the reward. If there had been regular fees due for the duties performed, and the defendant had intruded into the offices, the plaintiff might either have supported an action for money had and received or for disturbing him in his offices.

ASHHURST, J.:

This is a *damnum sine injuriâ*, for which no action will lie; the plaintiff has not been injured, for the defendant had the trouble of shewing the church.

GROSE, J.:

The grant only permits the plaintiff to shew the church, but that is not the grant of any office. The sums given for shewing

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the church are mere gratuities; and the law does not imply any promise by the defendant to restore to the plaintiff the money so received by the former for his own labour. If there were any appropriated fees, the case would be different; but the sums of money paid to the defendant were not fees, but gratuities for the trouble he had taken.

LAWRENCE, J:

The argument in support of the rule proceeds on a supposition that the plaintiff would have received the money that the defendant has received: but it depends entirely on the behaviour and civility of the person shewing the church; and *non constat* that any thing would have been paid to the plaintiff, if he had shewn it.

Rule discharged.

K. B. TRINITY TERM.

1796.
May 30.
[691]

HOLT *v.* SCHOLEFIELD.

(6 T. R. 691—695.)

Saying of the plaintiff that he has forsworn himself, and that the defendant had three evidences that would prove it, is not actionable without shewing that the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn. Where some counts in a declaration are good and some bad in law, and general damages are given, the Court will arrest the judgment *in toto*, and will not award a *venire de novo*.

IN an action for slander, the declaration stated that the plaintiff was a person of good name and never was guilty nor before the uttering of the words herein-after mentioned suspected to have been guilty of perjury, yet the defendant maliciously intending to injure the plaintiff in his good name, and to bring him into public infamy and disgrace, and to subject him to the punishment provided by the laws of this realm against persons guilty of wilful and corrupt perjury, on, &c. spoke and published of and concerning the plaintiff these false scandalous and malicious words, viz.

"Tim Holt (meaning the plaintiff) has forsworn himself, (meaning that the plaintiff had committed wilful and corrupt perjury,) and I (meaning the defendant) have three evidences that will prove it." The 2nd count charged the defendant *with uttering these words to another person, of the plaintiff; "you know he is perjured." The 3rd was that he (the plaintiff) was perjured. The 4th was "you (the plaintiff) are perjured; you have forsworn yourself." To which the general issue was pleaded, and the plaintiff obtained a verdict for 50*l.* damages.

Topping and *Holroyd* in the last Term obtained a rule calling on the plaintiff to shew cause why the judgment should not be arrested for a defect in the first count, contending that as the damages were entire if one count were bad the judgment must be arrested generally. The words in the first count, "he has forsworn himself, and I have three witnesses to prove it," are not in themselves actionable, because they do not necessarily imply that the plaintiff had forsworn himself in a judicial proceeding, which alone will constitute the crime of perjury; and the meaning of them cannot be varied by an innuendo, unless with reference to some colloquium (which is not here stated) from whence it might appear that the words were spoken concerning some judicial proceeding that had before taken place in which the plaintiff had given testimony, and which ought to have been averred in order to warrant the innuendo. And they cited 1 Rol. Abr. 39; 3 Inst. 166; 4 Co. 17 b; Hardr. 151; 3 Lev. 166; 2 Bulstr. 140;† Cowp. 684.

Erskine, Bayley, and *F. Vaughan,* now shewed cause against the rule:

The obvious and known meaning of the word "forsworn" is an imputation of perjury upon the party concerning whom it is spoken; and such is the sense in which it is explained not only in Johnson's Dictionary, but in a case expressly adjudged upon the subject of *Smale* v. *Hammon,*‡ where the words were "Thou wert forsworn, and I can prove thee forsworn when I will;" which were held actionable upon a motion in arrest of judgment;

† *Vid.* 3 Bulstr. 150. ‡ 1 Bulstr. 40.

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WILLIAMS, J. saying that the rule was that, where the words spoken tend to the infamy discredit or disgrace of the party, they are actionable. * * The innuendo does not enlarge the sense of the word spoken, but merely explains and gives it its proper signification. In *Oldham* v. *Peake*† the plaintiff declared that on a colloquium concerning the death of one Daniel Dolly the defendant said to the plaintiff "I am thoroughly convinced that you are guilty," innuendo of the murder of the said D. D., which innuendo was held good: and yet the crime of murder could less easily be affixed to the sense of the word death than the "forsworn" may mean "perjured;" and at all events the phrase "guilty of the death" might as well be applied to the crime of manslaughter as to that of murder. But the Court there said that the colloquium was not contradictory but explanatory; not introductory of new matter but ascertaining the meaning of the [*694] old; so the same *observation will apply with equal force to the innuendo in this case. 2ndly, The other counts, and especially the two last, are at all events good; and therefore judgment cannot be arrested *in toto* according to *Grant* v. *Astle*,‡ but there must be a *venire de novo;* or the verdict may be amended by the Judge's notes and entered up on the good counts.

LORD KENYON, Ch. J:

The only case that warrants this mode of declaring is that in 1 Bulstrode, but that seems to be against the current of authorities. Either the words themselves must be such as can only be understood in a criminal sense, or it must be shewn by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable. I remember a case here many years ago where the judgment was arrested on an information for a libel on some justices in Suffolk, because there was no averment that the libel was of and concerning the justices in Suffolk.§

GROSE, J.:

There is a distinction in the books between being perjured, and being forsworn: the former means false swearing in a judicial proceeding, but the other has not the same meaning.

† 2 Black. Rep. 959. ‡ Dougl. 722. § *Vid. R.* v. *Alderton*, Say. 20.

LAWRENCE, J:

The plaintiff wishes us to consider the introductory part of this declaration in the nature of a colloquium; but if that could be done none of the objections in the books could have prevailed, because the same sort of introduction is inserted in almost all the declarations. With regard to the case in 1 Bulstrode, I think that Mr. J. WILLIAMS goes too far in saying that words that "tend to the infamy, discredit, or disgrace, of the party" are actionable. That rule is too general; the more correct rule is laid down in *Onslow* v. *Horne*, 3 Wils. 86. "The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor." There is also a case in 1 Sid. 48 that is directly contradictory to the case in Bulstrode. And if the words here are not actionable in themselves, their meaning cannot be extended by an innuendo, 4 Co. 17 b. That case is an express authority to shew that "forsworn" cannot be explained by an innuendo to mean false swearing in a Court of Justice.

The COURT were of opinion that there should not be a *venire de novo*, and that as the damages were entire the judgment must be arrested *in toto*.* And

LAWRENCE, J. said that the plaintiff ought not to be at liberty [695] to amend by the Judge's notes in this case, because the evidence applied as well to the bad as to the good counts.†

Judgment arrested.

* *Sed vid. Auger* v. *Wilkins*, Barnes, 478; and *Eddowes* v. *Hopkins*, Dougl. 377.

† *Vid. Eddowes* v. *Hopkins*, Dougl. 377.

1796.
June 2.

[701]

IN THE MATTER OF CROSSLEY, CLARKE, AND BRIERLY, ATTORNIES.

(6 T. R. 701.)

If an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the Court will grant an attachment against him, though he positively deny the malpractices imputed to him.

IT was strongly insisted on behalf of the defendants, who were called upon by a rule to answer the matters of certain affidavits imputing malpractices to them, that as they had by their affidavits positively and pointedly denied the charges, the rule must be discharged, though they would be liable to indictments for perjury if the facts sworn to by them in their answers were false.

But the COURT were of opinion that it was not sufficient to answer the charge in direct terms, for that if the story represented by the defendants were not credible * an attachment must be granted against them. And the story told by these defendants appearing to the Court highly incredible, an attachment was granted.

Erskine and *Garrow* for Crossley.

Mingay and *Gibbs* for Clarke.

Adair, Serjt., and *Russell* for the rule.

* *Ex parte Nowlan*, p. 130, *ante*.

WORSLEY *v.* WOOD AND OTHERS, ASSIGNEES OF LOCKYER AND BREAM, BANKRUPTS.

1796. *June* 7.

[710]

IN ERROR.

(6 T. R. 710—722.)

If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy.—By the proposals of the Phœnix Company it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens and some reputable householders of the parish, importing that they knew the character, &c., of the assured, and believe that he really sustained the loss and without fraud:" held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate.*

THIS was an action of covenant brought in the Court of Common Pleas. * * By a policy of assurance Worsley covenanted with L. and B. that so long as the assured should pay a certain premium, the capital stock and funds to the Phœnix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned, not exceeding 7,000*l.*, according to the tenor of the printed proposals delivered with the policy. In the printed proposals referred to by the policy it was declared that the Company would not be accountable for any loss by fire caused by foreign invasion, civil commotion, &c., and also that all persons assured sustaining any loss by fire should forthwith give notice to the Company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts or other vouchers as should be reasonably required; and should procure a certificate under the hands of the ministers and churchwardens and of some reputable householders of the parish not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any

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* The principle of this case is recognised as settled law by Lord BLACKBURN in *London Guarantee Co.* v. *Fearnley* (H. L. 1880) 5 App. Ca. 911, 916.—R. C.

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kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the Company touching any loss, such difference should be submitted to the judgment of arbitrators indifferently chosen, whose award should be conclusive, &c.; and when any loss should have been duly proved, the assured should immediately receive satisfaction to the full amount of the same. [A fire occurred on the premises causing loss for which a claim was made under the policy. It appeared from the pleadings on the part of the plaintiff, who was the assured, that the plaintiff had procured and delivered a certificate signed by four respectable householders; but that the minister and churchwardens wrongfully refused to sign it without any reasonable or probable cause for so doing.]

[712] The jury found all the issues for the plaintiffs, and gave a verdict for 3,000*l.*

The defendant below removed the record* into this Court by writ of error, and assigned for error that the pleadings of the plaintiffs below were not sufficient in law to maintain the action.

[713] This case was twice argued in this Court, the first time in last Easter Term by *Wood* for the plaintiff in error and *Lambe* for the defendants, and now by *Law* for the former and *Gibbs* for the latter. * * *

LORD KENYON, Ch. J.:

* * * This case requires our serious consideration, because the
[718] Court of Common Pleas have already given their opinion on it in favour of the plaintiff's claim, though it has been suggested that it was not the unanimous opinion of that Court.† We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favour of the defendant below. These insurance companies, who enter into very

* *Vide* 2 H. Bl. Rep. 504.

† Mr. Justice HEATH differed from the rest of the Court of C. B.

extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence therefore suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phœnix Company have provided, among other things that the assured should as soon as possible after the calamity has happened deliver in an account of their loss and procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation this very case is sufficient to convince us; for it appears on the record that soon after the fire the assured delivered in an account of their loss which they said amounted to 7,000*l.*, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the loss did not exceed 3,000*l.*, and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7,000*l.*, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals that it was their intention that it should precede payment. What is a condition precedent or what a condition subsequent is well expressed by my brother ASHHURST in the case of *Hotham* v. *The East India Company*, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single: *but however improbable the thing may be it must [*719] be complied with, or the right, which was to attach on its being performed, does not vest. If the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord Coke to the present moment it has not been doubted but that the right which was to depend on the per-

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formance of that condition did not arise. In the case of *Hesketh* v. *Gray*,† which has been cited as a determination in this Court, there was also an application to the great seal at the time when Lord Ch. J. WILLES was the first commissioner to dispense with the condition, which was that the Bishop of Chichester should accept the resignation of a living; but it was held that there was no ground for a Court of Equity to interfere. This Court also held, when the case came before them, that it was a condition precedent, and must be performed.

In this case however it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy près*. But I confess I do not see how the terms *cy près* are applicable to this subject; the arguments for the plaintiffs below go to shew that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of *Campbell* v. *French*‡ we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals, they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that the minister and churchwardens may obstinately refuse to certify, the insurers answer "we will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been [*720] effected; and therefore I am clearly of opinion *that there is no foundation for the action, and that the judgment below must be reversed.

† Sayer, 185. ‡ P. 154, *ante*.

ASHHURST, J.:

The question is whether the certificate required be or be not a condition precedent; if it be, the plaintiffs below cannot maintain their action. It is perfectly immaterial whether they have entered into an improvident contract; if they choose to take the burden upon themselves, they cannot call on the insurance office until they have complied with the condition. I think that it is a condition precedent, and that the assured engaged at all events to procure the certificate before they applied to the office for an indemnity. Nor is there any thing unreasonable in these terms. It is well known that great frauds are sometimes practised on the insurance offices, and therefore it behoves them to take all care to prevent frauds. In order to guard more effectually to protect the Phœnix Company, they insist on having a certificate from the minister and churchwardens, from persons who are not likely, from their situations in life, to assist in such frauds. But as the plaintiffs below have not procured that certificate they cannot maintain this action.

GROSE, J.:

Four questions arise on this record; 1st. Whether the printed proposals are to be taken as part of the policy of insurance; 2ndly. Whether that part respecting the certificate creates a condition precedent; 3rdly. If it does, whether the assured were bound to perform the conditions; 4thly. Whether they have performed it. These are the material points. On the first, the case of *Routlege* v. *Burrell* is decisive to shew that the printed proposals are to be taken as part of the policy. The second point also seems to me to be decided by the case of *Oldman* v. *Bewicke*. For though the words in both proposals are not exactly similar, the substance is the same. And what my brother ASHHURST said in the case of *Hotham* v. *The East India Company* is applicable here, that there are no precise words necessary to make either a condition precedent or subsequent, but that the question must depend on the intention of the parties. As to the third point, the cases alluded to by the defendant's counsel (to which another in 22 Edw. IV. 26 b, may be added) are strong to shew that if a person engage for the act

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of a stranger, he must procure that act to be done. With regard to the last point, the assured have not obtained the certificate required, but they have procured a certificate which under the circumstances of the case they consider equivalent to it, namely, a certificate by some of the reputable inhabitants of the parish. It is true that *the minister and churchwardens were not bound to certify; but the assured undertook to procure such a certificate; that is a condition on performing which alone the Phœnix Company engaged to pay any loss that might arise. It is admitted that the assured did not procure such a certificate, but they say that the minister and churchwardens wrongfully and without any reasonable or probable cause refused it: but that, if true, is no ground for supporting this action; it is a misfortune to the plaintiffs, but it ought not to prejudice the defendant. It is not sufficient that there is no probable cause for not certifying, there ought to be a probable cause to induce the minister and churchwardens to certify; they ought to be satisfied with the truth of the loss before they certify. Here they were requested to certify that the plaintiffs had sustained a loss to the amount of 7,000*l.*, but the jury found that the loss only amounted to 3,000*l.*; therefore the minister and churchwardens could not, in conscience, sign the certificate which was offered to them. If the certificate which the assured procured were considered as a compliance with this condition, a certificate by the inhabitants of any other parish might equally be substituted in lieu of that which was required: but it is not competent to the assured to substitute other terms for those which were the foundation of this contract. * *

LAWRENCE, J.:

* * * With respect to the principal question; this is an action to recover a loss which the insurance office are only liable to make good according to the terms of their engagement. There is no ambiguity in those terms; they were perfectly well known to all parties, and the plaintiffs below must be considered as having assented to them. It has been argued, however, that the certificate was not a condition precedent, and that the plaintiff's right attached on the happening of a fire without fraud, and that

this may be collected from the difference of penning the different proposals. But it does not seem to me that a fire without fraud will give the assured a right of action: it must be a fire, accompanied with a *notice, affidavit, and certificate, specified in the proposals. And as to the wording of the different articles, that speaking of a loss by foreign enemies, &c. is an exception; it is a loss for which the insurance company are not answerable; and for other losses they are only liable on certain conditions. Then it was argued on behalf of the plaintiffs below that it was sufficient for them to perform the conditions in substance: even admitting that argument to be well-founded, there was no substantial performance here. In some cases in the books respecting conditions precedent, where the thing agreed to be done was in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance; as where the condition was to enfeoff, a conveyance by lease and release has been deemed a compliance. So if the condition be to deliver the will of the testator, and he delivers letters testamentary. 1 Rol. Abr. 426. pl. 2, 4. But this, instead of being a substantial performance of the condition, is only a substitution of one thing for another. Suppose the terms of this contract had been that the insurance office should not pay any loss unless A. B. and C. certified, it would not have been sufficient for E. F. and G. to certify. So here the agreement was that persons of certain characters should certify; and when the assured substitute, for such a certificate, one signed by persons bearing different characters, it is the same as a certificate signed by persons of different names from those required. Perhaps it is difficult to ascertain who shall be called reputable or substantial persons; and in order to avoid this difficulty, the insurance office insist on the certificate being signed by persons who hold public situations in the parish. These terms seem highly reasonable; it is a duty that the office owe to the public as well as to themselves to take every precaution to protect them against fraud; and unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses. Then as this is a condition precedent, even supposing that the

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refusal by the minister and churchwardens were a wrongful act in them, (which I do not admit under these circumstances,) the cases are uniform to shew that if a person undertake for the act of a stranger, that act must be done. Therefore I agree that the judgment below must be reversed.

Judgment reversed.

1796.
June 10.
[741]

SHAKESPEAR *v.* PEPPIN.

(6 T. R. 741—748.)

The lord of a manor, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, &c., if he leave sufficient common of pasture.

REPLEVIN for taking the plaintiff's cattle in Sharp Thorne Common, otherwise Walton Common, in Surrey. Avowry, that the place where, &c. was formerly part and parcel of the said common, but was lately inclosed and separated from the rest of the common, and is the soil and freehold of the defendant; and because the plaintiff's cattle were doing damage there, the defendant avows the taking, &c. as a distress.

Plea in bar, that the *locus in quo* has been immemorially part of Walton Common, and lying within and parcel of the manor of
[*742] Walton-upon-Thames; that four closes of land called *Floysters Roydens have been immemorially within and parcel and a customary tenement of that manor, demised and demisable by copy of court-roll, &c.; that the lords of the manor in 1789 by copy granted this customary tenement with the appurtenances to the plaintiff; and that there is a custom in the manor for the tenants of this customary tenement to have common of pasture on Walton Common, for which reason the plaintiff in his own right put his cattle on the said common to depasture, and the defendant wrongfully took them, &c.

Replication, that the lords of the manor in 1794, and before the plaintiff's cattle were put in, &c., by lease and release conveyed the *locum in quo* to the defendant in fee, to the intent

that he might inclose and approve the same; that he did separate and divide the same from the rest of the common by fences, &c., leaving in the residue of the common sufficient common of pasture for all the commonable cattle of the plaintiff and of all other persons having right, &c.

Rejoinder, that there is a custom within the manor for the tenants of Floysters Roydens tenement to have as well the liberty and privilege of digging for and carrying away sand loam and gravel in and from the common as common of pasture there; that, because the *locus in quo* was so inclosed by fences, &c. that the plaintiff could not enjoy his right and liberty of digging for sand, &c. on the common in so ample and beneficial a manner as he ought, he pulled down the fences that separated the place in question from the rest of the common, and the fences being so pulled down and the place in question remaining open and undivided from the rest of the common he put in his cattle to depasture, &c.

Sur-rejoinder, that at the time of the inclosure and approvement by the defendant there was left in the residue of the common sufficient sand, &c. for the plaintiff and all others having the same right, &c.; and that the place in question remained separated and divided from the rest of the common until the plaintiff of his own wrong pulled down the fences and put in his cattle to depasture, &c.

To the sur-rejoinder there was a general demurrer.

Best in support of the demurrer:

The great question in this case is whether, when the tenants of a manor have a right tc dig for sand, loam, and gravel on a common within the manor, the lord can inclose and approve under the Statute *of Merton; † on behalf of the plaintiff it is insisted that he cannot. Before that statute it was doubted whether a lord could approve any part of a common even against persons having common of pasture. In *Geo* v. *Cother* ‡ WINDHAM, J. said, "Before the statute the lord could not approve." So Lord Coke§ commenting on this statute said, "Hereby it appeareth that the lord could not approve by the order of the common law,

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† 20 Hen. III. c. 4. ‡ 1 Sid. 106. § 2 Inst. 85.

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because the common issued out of the whole waste and of every part thereof." Here too the tenant claims his right by custom: and Lord Coke,† commenting on the statute of Westm. 2,‡ said, the lord could not approve against a commoner by grant. Then if he could not approve against those claiming by grant, neither can he against those claiming by custom, because a custom presupposes a grant from the lord to the tenant. * * *

[744] *Barrow, contrà:*

It is not necessary in this action of replevin to discuss the right of the lord to inclose and approve against tenants having a right to dig for sand loam and gravel; it is sufficient for the determination of this case that he has, either by the common or the statute law, a right to approve against tenants having right of common of pasture. The defendant in his avowry justifies taking the plaintiff's cattle as damage feasant on his soil; to this [*745] the plaintiff in *his plea in bar says that the place in question has been immemorially part of Walton Common, and that he in right of a certain tenement has common of pasture over the common; the defendant in answer to that plea replies that before the plaintiff's cattle were put in upon the common, the place in question was inclosed under a grant from the lords of the manor, and that a sufficient common of pasture was left. If the facts of that plea be true, they furnish a complete answer to this action, and those facts are admitted by the plaintiff on the record. Then the subsequent pleadings are wholly irrelevant to this question. To the replication the plaintiff rejoins that there is a custom to dig for sand loam and gravel: but that is inconsistent with and a departure from the plea in bar; in his plea in bar he relies on his common of pasture, and in his rejoinder he relies on another right, namely, a right to dig for sand loam and gravel. But even if the rejoinder be not a departure from the plea in bar, still the matter disclosed in the rejoinder is no answer to the replication; for in *Fawcett* v. *Strickland*,§ it was expressly held that a right of common of turbary will not prevent

† 2 Inst. 474. ‡ 13 Edw. I. c. 46. § Com. Rep. 577.

the lord's inclosing and approving against persons having right of common of pasture; and the latter right is admitted on this record. * * *

Best in reply.

The case stood for a second argument; but when it was called on in the paper, [747]

Lord KENYON, Ch. J. read Lord Ch. J. WILLES's manuscript note of the judgment delivered by him in *Fawcett* v. *Strickland*, of which only a short note appears in Com. Rep. 577, and which the Court thought decisive in favour of the defendant in this case.

That note being communicated to the counsel,

Adam, who was to have argued for the plaintiff to-day. acknowledged that he could not get over the authority of that case, and accordingly judgment was given for the defendant.

The pleadings in *Fawcett* v. *Strickland* are correctly abstracted in Com. Rep. 577. The parts of Lord Ch. J. WILLES's judgment, as applicable to this case, are as follow: "But what the Court goes upon is, that this is an action brought by the plaintiff for chasing and driving away his cattle put into the defendant Strickland's inclosure to use and enjoy common of pasture; and therefore we think that considering the nature of the plaintiff's action, and the wrong which he complains of therein, the common of turbary is quite out of the case.

"For though a lord cannot by virtue of the Statute of Merton, 20 Hen. III. c. 4, inclose and approve against common of turbary, and so it is expressly laid down by Lord Coke in 2 Inst. 87, in his comment on this Statute, which we admit to be good law, yet we are of opinion that where there is common of pasture and common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights.

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"Supposing one man has common of pasture and another has common of turbary in the same waste, he that has common of pasture cannot justify throwing down the lord's inclosure, provided there be sufficient common of pasture left, because another person has common of turbary in the same common. And wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, we *think it will be just the same though they happen to concur in one and the same person, as they do in the present case. If it were otherwise, it would be just the same in common of piscary, or common of estovers, for Lord Coke says that the Statute does not extend to either of them. And yet it would seem to be absurd to say that a lord cannot inclose against common of pasture, because his tenants or some other persons have common of piscary or common of estovers in the same waste; whereas his inclosure may be no interruption to their enjoyment of their common of piscary or estovers, nay, probably their common of estovers may be better for such inclosure.

[*748]

"If indeed by such inclosure their common of piscary or their common of estovers were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord (to be sure) in such case could not justify such inclosure in prejudice of these rights. And so may the plaintiff in the present case, if he be interrupted in the enjoyment of his common of turbary: but by his present action he does not complain of any such interruption, nor does he insist upon any such matter in his replication.

"As therefore his only complaint is of an interruption of his common of pasture, as by the Statute of Merton the defendant Strickland might certainly inclose part of the common, notwithstanding the plaintiff's right of common of pasture, if he has left sufficient common of pasture, which in the present case is admitted by the pleadings, we are of opinion that the right of common of turbary insisted upon by the plaintiff in his replication is no answer to the defendant's plea; that therefore the replication is bad in substance; and that judgment, so far as the demurrer goes, must be for the defendants."

THE COMPANY OF PROPRIETORS OF THE BRECKNOCK AND ABERGAVENNY CANAL NAVIGATION *v.* PRITCHARD AND OTHERS.

1796. *June* 10.

[750]

(6 T. R. 750—752.)

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood.

THIS was an action of covenant on articles of agreement, dated the 6th of August, 1793, in which the defendants covenanted to erect and finish in a substantial and workmanlike manner a bridge across the river Usk in the county of Brecknock on or before the 10th of December then next, and to uphold and keep it in complete repair for seven years; the declaration stated that though the defendants did build and finish the bridge they had not upheld and kept it in complete repair, &c., for that on the 10th of February, 1795, it was washed broken and fell down, and that the defendants had not upheld and rebuilt it, &c.

To this the defendants pleaded that until and at the time when the same was so washed broken and fell down as mentioned in the declaration, the bridge was well built and in complete repair, and capable of resisting any usual or ordinary flood, &c.; and that then the said bridge by the act of God by a great unusual and extraordinary flood of water, such as such bridge so well built and in complete repair could not reasonably be expected to resist, by means of the waters of *the said flood [*751] rushing and pressing against the same was without the default of the defendants, or its being in their power to prevent, washed broken and fell down, &c.

The plaintiffs demurred to this plea.

Wood in support of the demurrer:

The defendants are bound by their express covenant to keep the bridge in repair for the seven years, notwithstanding the accident stated in the plea. The distinction taken in the books is this, "When the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: but when the party by his own contract

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creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if a lessee covenant to repair a house, though it be burned by lightning or thrown down by enemies, yet he ought to repair it": All. 27; Dy. 33, a; Com. Rep. 627; and *Bullock* v. *Dommitt*, p. 300, *ante*. And here a loss by a flood must have been the very loss in the contemplation of the parties.

Praed, contrà:

Although a loss by a common flood was probably in the contemplation of the parties, they did not look forward to the extraordinary flood which is alleged in the plea as the occasion of this loss, nor was it in their contemplation to become insurers. They covenanted to build a bridge in a substantial manner, and to keep it in repair for a certain term. Now it is admitted on the record that the bridge was built in a substantial manner, and was in complete repair and capable of resisting any ordinary flood at the time when the accident happened; but under this covenant the defendants are not answerable for losses occasioned by extraordinary floods. Even in cases of covenant, as well as in cases of legal obligation on the parties, impossibility will discharge the party from the performance of his contract. *Williams* v. *Lloyd*, Sir W. Jon. 179; Palm. 548. In *Keighley's* case † "It was resolved that if one who is bound by prescription to repair a wall *contrà fluxum maris*, and he keeps the wall in good repair and of such height and as sufficient as it was accustomed, and by the sudden and unusual increase of water salt or fresh the walls are broken, or the water overflows the walls, the commissioners of sewers ought to tax all persons who hold any lands, &c. or [*752] may have any *loss, &c. for no fault in this case was in him who ought to repair it." Now a prescription supposes some original contract. The cases referred to by the plaintiffs are cases between landlords and tenants; and in the case cited from Allyn it is mentioned as one of the reasons for the judgment of the Court, that as the tenants are entitled to the casual profits they ought to be liable to casual losses. And though it has been

† 10 Rep. 139, a.

held that the tenant is liable at law to pay the rent though the house demised be destroyed, yet a court of equity will give him relief. *Brown* v. *Quilter*, Amb. 619.

LORD KENYON, Ch. J.:

It has been usual for many years past to insert covenants of this kind in contracts for building bridges; and though accidents like the present have frequently happened, this defence is now for the first time made. A similar accident happened some years ago to a bridge in Northumberland, but it did not occur either to the parties, or their counsel in law or equity, for the cause was in both courts, to set up this defence. This sort of loss must have been in the contemplation of all the parties in this case; the bridge was to be built in such a manner as to resist any body of water. The principle stated by the counsel for the plaintiffs is the true one: if the defendants had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception. It is sufficient to say here that the contract of the defendants extends to this case, that they have not fulfilled it, and therefore that they are answerable.

Judgment for the plaintiffs.

C. P. MICHAELMAS TERM.

1791.
Nov. 21.
[2]

REDRIDGE *v.* PALMER.

(2 H. Bl. 2—4.)

Where, to an action of trespass, the defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40*s*., and the judge at the trial, does not certify.

In this action of trespass, the declaration, which contained only one count, stating that the defendant with force and arms broke and entered a certain close of the plaintiff, called the Yard, situate, &c. and then and there broke down, prostrated, &c. two wooden fences, &c. and the materials thereof, to wit, 500 pales, &c. took and carried away, &c. and also then and there pulled down, spoiled and destroyed a certain hog-stye, &c. and the materials thereof, to wit, 50 cartloads of wood, &c. took and carried away, &c. and then and there ejected, expelled, and put out the plaintiff from the possession, &c. of his said close, &c

The defendant pleaded, first, not guilty; secondly, a plea of licence to all the trespasses mentioned in the declaration; on both of which pleas issues were joined.

These issues came on to be tried before Mr. Baron Hotham, at the last Lent assizes at Kingston, for the county of Surrey, when, on each of them, a verdict was found for the plaintiff, with one shilling damages, and 40*s*. costs; but the judge did not certify. The prothonotary having allowed full costs to the plaintiff, a rule was granted to shew cause why the taxation
[*3] should not be reviewed, on the ground that as the damages *were under 40*s*. and there was no certificate, the plaintiff was entitled to no more costs than damages.

[The rule having been argued by *Kerby*, Serjt. (showing cause), and *Bond*, Serjt. *contrà*:]

1791.
REDRIDGE v. PALMER.
[*4]

*Lord LOUGHBOROUGH on this day declared, that, after due consideration, the Court were of opinion that whatever question might be made on the true construction of the statute,† as to the *asportavit* of personal chattels, yet as the practice had been uniform for a great length of time, above 100 years, it would be highly inconvenient to disturb it. The rule therefore, which had so long prevailed in both this Court and the King's Bench, namely, that where there was a special plea of justification found against the defendant, the plaintiff was entitled to his full costs, ought not to be overturned.

Rule discharged.

Note.—Having regard to the present rules of Court (Ord. LXV. R. 1) by which costs, generally, are in the discretion of the Court; cases relating only to costs are sparingly retained in the Revised Reports. The above case is retained as one which was decided "upon great consideration," (*Comer* v. *Baker*, 1 H. Bl. 342 *n.*), and in conformity with an established practice grounded upon a principle.—R. C.

GODING *v.* FERRIS.

(2 H. Bl. 14—16.)

1791.
Nov. 28.
[14]

An action cannot be maintained against officers of the customs for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; notwithstanding a suit is instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months.

THIS was an action of trespass, for seizing, taking and carrying away, at Cowes in the Isle of Wight, a lug sail boat of the plaintiff, together with her furniture, tackle, &c. and divers other goods and chattels of the plaintiff, to wit, 500 wooden casks, 200 gallons of brandy, &c. &c. under pretence that the same were forfeited, and were seized as forfeited by the defendant under and by virtue of some or one of the laws relating to his Majesty's customs: Whereby, &c. &c. The second count was for seizing the boat and goods, &c. generally.

The defendant pleaded not guilty, on which issue was joined.

† *Sc.* 22 & 23 Car. II. c. 9.

1791.
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v.
FERRIS.

This issue came on to be tried before Lord Loughborough, at the last assizes at Winchester, when it appeared in evidence that the seizure was made by the defendant, who was mate of the *Speedwell* cutter, belonging to the Custom-house, on the 11th of May, 1787, on the high seas in Shoreham Bay; that it was returned into the Court of Exchequer in the name of the defendant, where proceedings were had to condemn the seizure, but that on the 26th of February, 1789, the plaintiff obtained a writ of delivery out of the Court of Exchequer which was not executed, he not having given the usual security in double the appraised value according to an order of that Court: that on the 9th of August, 1790, a notice was delivered to the defendant dated the 6th of May, 1790, of the plaintiff's intention to commence this action, in pursuance of stat. 23 Geo. III. c. 70, s. 30, and 24 Geo. III. Sess. 2, c. 47, s. 35.* On the 30th of September, the action was commenced by suing out a *capias ad resp.*

It was objected by the counsel for the defendant, that the action was not commenced within three months next after the matter or thing done, nor within three months next after the cause of action arose, as required by the statutes above mentioned. Lord LOUGHBOROUGH was of this opinion, and it was agreed that a verdict should be found for the defendant, subject to the opinion of the Court on those points; for which purpose [15] an order of *Nisi Prius* was made. And a rule having been granted for the defendant to shew cause why the verdict found for him should not be set aside, and instead thereof a verdict returned on the back of the record for the plaintiff,

[The rule having been argued :]

[16] On this day, GOULD, J. declared, that after due consideration, the Court had no doubt but that the opinion which Lord LOUGHBOROUGH held at the trial was right, viz. that the time when the limitation of the three months was to commence, was to be reckoned from the actual seizure, that being the wrongful act or thing done, according to the meaning of the legislature.

Rule discharged.

* The same provisions are substantially embodied in the extant Act, 7 & 8 Geo. IV. c. 53, ss. 114—118.

C. P. TRINITY TERM.

1792.
June 19.

[43]

BROWN *v.* LEESON.

(2 H. Bl. 43—46.)

No action will lie on a wager respecting the mode of playing an llegal game; and if such a cause be set down for trial, the judge at *Nisi Prius* will order it to be struck out of the paper.*

[THIS was an action of *assumpsit* on a wager as to "the number of ways of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick to seven."]

When the cause came on for trial, Lord LOUGHBOROUGH directed it to be struck out of the paper, as being of a nature highly improper to be made the foundation of an action; with a proviso, that it should be restored, in case the Court should, upon argument, be of a different opinion. Accordingly, a rule was obtained to shew cause why it should not be restored to the paper. [44]

[After argument upon the rule the Court gave judgment as follows:]

GOULD, J.: [45]

I think my Lord Chief Justice did perfectly right in refusing to try this cause. The game of hazard stands condemned by the law of England; there are many statutes which make it illegal, and nothing can be more injurious to the morals of the nation, than a public discussion of this nature, before an audience whose curiosity is whetted to attend the trial of such questions. The refusing therefore to try it was both laudable and legal. In *Da Costa* v. *Jones*,† which was on a wager concerning the sex of Madame D'Eon, I believe Lord MANSFIELD refused to try it a second time; and I very well remember that the only ground on which Mr. Justice BURNET was thought to [46]

* Such an action would now be incompetent by reason of the statute 8 & 9 Vict. c. 109, s. 18. The judgments in the case are, however, important as bearing on the question, what are illegal games.—R. C.

† Cowp. 729.

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BROWN v. LEESON.

have done wrong in the case before him,* where he threw the record out of Court, and refused to hear the trial on account of its indecency, was, that it involved a civil injury to the plaintiff, it being stated in the declaration that she had lost her marriage by reason of the slander.

HEATH, J.:

All games at dice except backgammon † are prohibited by law, and I think it would be vilifying and degrading courts of justice, if they were to hear, by means of a wager, a discussion on prohibited games.

LORD LOUGHBOROUGH:

This was a mere idle wager, and I have no hesitation in saying, that I think a court or a jury ought not to be called upon to decide such wagers. But that point is not now insisted upon, nor is it necessary; for the other ground is extremely clear. I therefore adhere to the opinion which I held at the trial.

Rule discharged.

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June 16.
[69]

GRANT *v.* SIR CHARLES GOULD AND OTHERS.

(2 H. Bl. 69—107.)

"Martial law," as the phrase is used by Hale and Blackstone, has no place in Great Britain. The jurisdiction of courts-martial is the creation of positive law under the Mutiny Acts. The receiving pay as a soldier subjects the receiver to this military jurisdiction. This Court therefore will not grant a prohibition to prevent the execution of the sentence of a court-martial passed against A., who has received pay as a soldier but has assumed the military character merely for the purpose of recruiting, in the usual course of that service; though the proceedings of the court-martial appear to be in some instances erroneous. ‡

THIS case arose on a motion for a prohibition to prevent the execution of a sentence passed against the plaintiff by a general court-martial holden at Chatham Barracks.

[The nature of the suggestions and evidence on which the motion was grounded, and of the arguments urged in support of

* See an account of that case in *Da Costa* v. *Jones*.

† And games played with the backgammon tables, 13 Geo. II. c. 19, s. 9.

‡ The modern Mutiny Acts expressly include persons engaged in the recruiting service.—R. C.

it, sufficiently appear from the judgment. The arguments were by *Marshall*, Serjt. in support of the motion, and *Adair* and *Bond*, Serjts. against it. *Marshall*, Serjt. was heard in reply.]

Cur. advis. vult.

On this day, the judgment of the Court was thus given by [98]

LORD LOUGHBOROUGH:

In this case, which arises on a motion for a prohibition, the novelty of the application was a sufficient reason why the Court should grant a rule to shew cause, and give it that consideration which the importance of it seemed justly to demand. It has been very fully argued on both sides, and with great ingenuity and ability. Every thing has been said in support of the motion by my brother *Marshall*, that any talents, ability, or ingenuity could suggest. But upon the result of the whole, the Court are clearly of opinion that the prohibition ought not to issue.

The suggestion begins by stating the laws and statutes of the realm respecting the protection of personal liberty. It goes on to state, that no person ought to be tried by a court-martial for any offence not cognizable by martial law, and so on. In the preliminary observations upon the case, my brother *Marshall* went at length into the history of those abuses of martial law which prevailed in ancient times. This leads me to an observation, that martial law such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by a military authority: every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the

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regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority.

[99] In the reign of King William, there was a conspiracy against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who attempted to set fire to the Docks at Portsmouth, were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain. But there is by the providence and wisdom of the Legislature an army established in this country, of which it is necessary to keep up the establishment. The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a Mutiny Act accompanying the army. It has happened indeed, at different periods of the Government, that there has been a strong opposition to the establishment of the army. But the army being established, and voted, that led to the establishment of a Mutiny Act. A remarkable circumstance happened in the reign of George I., when there was a division of parties on the vote of the army: the vote passed, and the army was established, but from some political incidents which had happened, the party who opposed the establishment of the army would have thrown out the mutiny bill. Sir Robert Walpole was at the head of that opposition, and then some of their most sanguine friends proposed it to them: they said as there was an army established, and even if the army was to be disbanded, there must

be a Mutiny Act for the safety of the country. It is one object of that act to provide for the army; but there is a much greater cause for the existence of a Mutiny Act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a State, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a Mutiny Act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in [100] good order and discipline. All history and all experience, particularly the experience of the present moment, give the strongest testimony to this. The object* of the Mutiny Act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army. Breaches of military duty are in many instances strictly defined; they are so in all cases where capital punishment is to be inflicted: and in other instances, where the degree of offence may vary, it may be necessary to give a discretion with regard to the punishment, and, in some cases, it is impossible more strictly to mark the crime than to call it a neglect of discipline.

This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the Courts of Westminster Hall, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts-Martial, Military Courts-Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority, which the courts of Westminster Hall

* These passages of the judgment are cited by MELLOR, J. in *Dawkins* v. *Paulet* (1869) L. R. 5 Q. B. 94, 119; 39 L. J. Q. B. 53.—R. C.

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have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance.

Another ground of prohibition, which is indeed but a species of the other, is where an Act has passed with respect to any authority resident in other courts, as in the Ecclesiastical Court, in which there is an inherent jurisdiction. In such a case, the courts of Westminster Hall have conceived that where the authority is limited by an Act of Parliament the Court which acted differently from the prescription of the Act was in that instance exceeding its jurisdiction, and therefore liable to a prohibition. Beyond these two grounds it does not occur to me that there is any other that can be stated, upon which the [101] courts of Westminster Hall can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction.* That they have decided wrong, may be a ground of appeal, may be a ground of review, but not a ground of prohibition. That has been distinctly laid down both in this Court and in the Court of King's Bench with respect to the courts of Prize,† and it is unnecessary to quote authorities upon a point which leave it without a contradictory opinion. With respect to the matter of evidence, where the inferior courts proceed upon the admission of evidence that could not be admitted in a court of law, or upon the rejection of evidence that would be admitted in a court of law, the 12th article of the complaint made against the judges in the reign of James I.,‡ and the answer to that article of complaint, shew distinctly the law upon that subject. The 12th article of complaint is, that the Courts have granted prohibitions to the Ecclesiastical Court upon the ground that the Ecclesiastical Court would not allow the testimony of a single witness to be sufficient in cases where in the common law courts the testimony of one witness would be sufficient, and their interference is the subject of complaint. The answer the judges make

* See this confirmed by the judgment of the Exchequer Chamber in *Dawkins* v. *Rokeby* (1878) L. R. 8 Q. B. 255, 271.—R. C.

† See *Brymer* v. *Atkins*, 1 H. Bl. 164; and *Home* v. *Earl Camden*, ibid 476; and 4 Term Rep. 382.

‡ 2 Inst. 608, *Articuli Cleri*.

to it is, that in matters subject to the exclusive jurisdiction of the Ecclesiastical Courts, as the setting out of tithes, proofs of a legacy, proofs of a marriage, the Courts do not prohibit, though the rule of the Ecclesiastical Court requires more evidence than the common law, to establish the fact; but that where incidentally a matter comes before them, there the courts of Westminster Hall, upon such surmise, will grant a prohibition.

I have stated the observations generally, upon the nature of an application for a prohibition. The foundation of it must be, that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the Court has acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review: though the sentence of a court-martial is not subject to a review, there are instances, no doubt, where, upon application to the crown, there have been orders to review the proceedings of courts-martial.

My brother *Adair* justly and correctly said, that a prohibition to prevent the proceedings of a court-martial, is not to be granted without very sufficient ground and due consideration. Not that it is not to be granted, because it would be dangerous in all cases to grant prohibitions; for it would be undoubtedly [102] dangerous if there was a facility in applying for prohibitions, and the sentence were to be stopped for asking it to be further enquired into. But in such cases it is the duty of the Court to consider the matter fully and deliberately upon the motion to prohibit, and the Court could not without great danger take the course in such a case which they have done in others where there is no danger in the delay to put the matter in prohibition, and determine it upon the record.

In this case, there are four grounds stated of prohibition. The first is a material one, because if the first ground is made out, that the Court had no jurisdiction over the person, then of course they were proceeding in a case in which by law they ought not to have been proceeding. In considering that ground, it turns upon the allegation that Grant, the person applying for the prohibition, was not subject to military law. I take it up, first, upon his affidavit, and where a prohibition is moved upon that ground, it is very material to consider what the party

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himself has said. In reading over this affidavit it is calculated to convey an opinion by argument, that Grant was not subject to military law; but he does not maintain any direct assertion upon which there could be an assignment of perjury, that he is not an object of military jurisdiction. Stating the engagement he had entered into with Captain Campbell, he says, "he did assume the character of serjeant in the 74th Regiment, in order to enable him to carry on the business of a recruiting agent; but that the deponent was never actually enlisted as a soldier.' When one knows more of the case as we do by reading the proceedings of the court-martial, it appears that he was never actually enlisted as a soldier, and therefore if he commenced originally as a serjeant, the assertion is true; but it affords no conclusion on this affidavit. He says nothing of an attestation, there is no denial that he ever was attested; and there is a circumstance in the proceedings of the court-martial, that gives strong reason to think that it is not a mere omission; because in the letters he produced himself from Captain Campbell to him, Captain Campbell tells him, (the expression is not "unless you get your attestation" but) "unless you take your attestation to Chatham, and have it entered there." So that the letter speaks of an attestation existing, but not deposited in the proper office. He goes on further and states, "that he did receive money from Messrs. Brummell, and in the receipts granted by the [*103] deponent he *did acknowledge the money there mentioned for his pay, and he believes he did annex the words following 'serjeant in the 74th Regiment,' but he says, that at the time he so received the money, and wrote those words, he did not consider himself to be really and truly a serjeant in the 74th Regiment, and such words were added to his subscription that it might appear to give it effect." He does not deny that he was a serjeant, he does not take that as a matter in issue. The assertion is simply of what passed in his own mind; and when he states that it was for the purpose of giving it effect, he cannot be allowed to say, "I did not mean by this to become truly and really a serjeant; I meant to take the situation, receive the pay, and describe myself as such, and not to be liable to the consequences." That cannot be permitted in any case. But

after these comments, it comes to this, the party applying for the prohibition, when he is to state his own case, states himself to be a person not subject to military law: this the Court will require in all such cases. But if he will not venture to assert that he is neither soldier nor serjeant nor of any military description, it is impossible for the Court to enter into the argument, and say from the argument and circumstances that have been stated this man shall not be considered as such, and therefore there is a ground laid for prohibition.

But when we come to compare the proceedings of the court-martial with the affidavit and the Act of Parliament, there is one circumstance in the Act which specifically applies. The Act does not leave it to a question whether his enlistment and attestation is regular or not, but it says, "any person who shall be enlisted or receive pay as a soldier." The being in pay as a soldier, fixes the military character upon him, and very wisely; and my brother *Bond* has shewn that this has been the course of all the Acts of Parliament which have passed relative to the military engagement. The Mutiny Act squares itself with the number of statutes which had passed relative to the military services, and the persons who are engaged to serve. It was not left to be discussed where there was a remedy by indictment, what was the nature of the engagement, or how it was contracted, but the mere circumstance of being in pay or having received prest-money, fixed on him the military character so as to subject him to the consequences of a felony if he acted in breach of that character. Grant has therefore been in pay as a soldier; it appears so upon his affidavit. The objection to the proceedings of the court-martial upon this head, seems to me very fairly to be [104] met by the answer that my brother *Adair* gave to it; for after the introduction of the receipt it was clearly shewn that he was in pay as a soldier, and there was an end to the enquiry upon that head. It is said, and my brother *Marshall* put it very ingeniously, that he will only be liable while he is so receiving pay, and that the last receipt of his pay does not prove he was actually in pay at the time of this offence. Whether he was or not, does not appear, and it is not necessary that it should, for a person in pay as a soldier is fixed with the character of a

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soldier; and if once he becomes subject to the military character, he never can be released, but by a regular discharge. Upon the first part of the case, therefore, I see no kind of doubt that can be entertained, but that this person was in a situation that made him the object of a military tribunal, and that the court-martial were proceeding against a person within their jurisdiction. But it was argued with a great deal of ingenuity, that there was a contrivance here; that by concert between the recruiting officer and him, he was put into this situation; and it was well understood between the officer and him that he was so far only in a military situation as to enable him to receive the pay, and do the recruiting service.

I think, allowing all the extent to that argument, it does not give the case much the more favour, when it comes to be considered that this is the case of a person putting himself into that situation, and visibly having made himself a party to it. But he is a soldier beyond all possibility of doubt; and after having stated that, perhaps it would not be necessary to go a great deal further.

But the second ground is the reception of improper, and the rejection of proper evidence. Here I must again recur to the answer to the complaints of the judges. That all common law courts ought to proceed upon the general rule, namely the best evidence that the nature of the case will admit, I perfectly agree. But that all other courts are in all cases to adopt all the distinctions that have been established and adopted in courts of common law, is rather a larger proposition than I choose directly to assent to. If, for instance, a witness excommunicated for contumacy were offered, he would not be received in a court of common law:* it is an established rule, and we are bound by it. But I do not hold that to be quite so extensive, as that it should go to courts-martial, naval or military. There are other [105] formal objections that do not affect the credibility of the witness, but in the present case I do not find the objections to be founded in fact. The first objection is the production of the letters of Captain Campbell. The affidavit states, that the letters were produced in evidence; but it suppresses in what manner they

* But see stat. 53 Geo. III. c. 127, s. 3.

were produced; it does not state that they were produced as evidence against the defendant. In fact therefore, the Court would find themselves unable to proceed upon that; and he shews immediately afterwards, by resting upon these letters, that of the letters of Captain Campbell he thought he had a right to avail himself, and did avail himself. It therefore amounts only to this, that the letters of Captain Campbell were produced. The first of them were brought out at the prisoner's request, and for the whole of his defence he rests upon the letters of Captain Campbell upon that part of the charge. As to the deposition of Heretage the objection is, that he was asked whether the contents were true as sworn, and the question was not put whether he acknowledged it to be his hand-writing. But in fact, Heretage is examined completely and perfectly, and when an objection was made with respect to Stephenson, the Court allowed the objection. What injury could he possibly sustain, when this deposition was read over?

The objection is, that Heretage had been first examined, and then his deposition read. It was read for the purpose of cross examination: the information could not have been come at if he had not been examined, and there would have been nothing to furnish the matter of a cross examination. Then the return was objected to. That the return may be falsified, my brother *Adair* never disputed; but that the return need not be verified, he contended rightly. It is then objected, that the question was never asked, how came it that Captain Campbell did not attend? But the prisoner summoned, by the Judge Advocate, all the witnesses he thought proper to call. The next objection is, the stopping the examination of Turtle, and the not examining Lunt. Now it appears, that it is not stated in the first place, in the affidavit, to what purpose they were to be examined; and therefore there the application would fail, because it is necessary to shew the Court the intent of their examination. For it is not the demand simply that such a witness should be examined, that a court-martial proceeds upon: but they will ask, for what purpose is such a witness to be called. In another part of the affidavit Grant states, that he was not permitted to prove by [106] witnesses that he was not a soldier: but he does not name any

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one witness, from whom that proof was to result: upon that ground therefore, if it could be a ground for a prohibition, I think there is not such a statement appearing on the affidavit, or supported by the proceedings, that if it were an application to us to grant a new trial, supposing this matter had been tried in this Court, we should have any reason to say, that the Court at the trial had done wrong in their rejection of some part of the evidence, or in the conclusions they drew from the other.

Then the other two grounds are, that Grant has not been convicted of the crime contained in the charge; and that the crime, of which he is convicted, is not an offence which makes him liable to the Mutiny Act. The charge is, the having advised and persuaded two men to enlist in the service of the East India Company, knowing them to be soldiers in the Coldstream regiment of Guards. This charge is distinct and specific, and the evidence which has been adduced in support of it, fully, in my apprehension, verifies and proves it. In drawing up the judgment of the court-martial they have taken a distinction, which, I confess, I do not perfectly understand. They say that the evidence amounted to a proof that the prisoner had encouraged and promoted the enlistment with the East India Company, which was a smaller shade of the offence described by the particular words in the charge. Upon the circumstances of this case, as they stood in the evidence before the Court, the enlistment with the East India Company was the act of desertion. There was no desertion, no quitting the service, in the two men getting drunk at different ale-houses, for the changing their clothes, and taking measures in order to desert, would all have been at an end, and entirely at an end, if the next day they had gone back to their regiment. The only thing that fixed them, was their attestation for the service of the Company; and therefore by that they had deserted from the service, in which they were engaged. Therefore the enlisting them into the service of the East India Company under the circumstances of this case, was conducting them in a direct act of desertion, and was not only advising and persuading, but doing something more; because Grant not only suggested to them the idea of leaving the service in which they were, but was the means of

their doing it. Instead therefore of an inferior degree, it appears to me directly and plainly within the words of *the charge. If a difference were to be made, it rather tended to an aggravation of the charge: and I think it would be totally unprecedented to make that the subject of a prohibition. [*107]

Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it, is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral, was certainly an inaccurate one. The question there was, whether the Court had not mistaken the law, yet a prohibition was not thought of.† But it is

† It is presumed, that his Lordship here alluded to the sentence against the unfortunate Admiral Byng, which was as follows:—

"The Court, pursuant to an order from the Lords Commissioners of the Admiralty, to Vice-Admiral Smith, dated 14th December, 1756, proceeded to inquire into the conduct of the Honourable John Byng, Admiral of the Blue Squadron of his majesty's fleet, and to try him upon a charge, that during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw or keep back, and did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as were engaged in the action with the French ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve St. Philip's Castle, in his majesty's Island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his majesty's command; and having heard the evidence, and prisoner's defence, and very maturely and thoroughly considered the same, they are unanimously of opinion that he did not do his utmost to relieve St. Philip's Castle; and also that, during the engagement between his majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did not do his utmost to take, seize and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his majesty's ships as *were engaged in fight with the [*108] French ships which was his duty to have assisted; and do therefore unanimously agree that he falls under part of the 12th article of an Act of Parliament of the 22nd year of his present majesty, for amending, explaining and reducing into one Act of Parliament the laws relating to the government of his majesty's ships, vessels and forces by sea; and as that article positively prescribes death, without any alternative left to the discretion of the Court, under any variation of circumstances, the Court do therefore unanimously

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unnecessary to discuss the sentence further; it would be extremely absurd to comment upon it as if it was a conviction before magistrates, which was to be discussed in a Court where that conviction could be reviewed.

I have thus gone through all the circumstances of the case, in order, as far as I can, to shew that the Court have paid great attention to the arguments which have been urged.

With respect to the sentence itself and the supposed severity of it, I observe that the severe part is by the Court deposited where it ought only to be, in the breast of his majesty. I have no doubt but that the intention of that was to leave room for an application for mercy to his majesty, from the goodness and clemency of whose disposition, applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve.

Rule discharged.

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June 16.
[114]

BRIGGS *v.* SIR FREDERICK EVELYN.

(2 H. Bl. 114—116.)

The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of an unqualified person, by stat. 24 Geo. II. c. 44, for it will be presumed that he acted as a justice.*

TROVER for a gun. The facts of the case were these: the plaintiff, who was a game-keeper of the manor of Effingham in

adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners shall direct.

"But as it appears by the evidence of Lord Robert Bertie, Captain Gardner, and other officers of the ship, who were near the person of the Admiral, that they did not perceive any backwardness in him during the action, or any mark of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the Court do not believe that his misconduct arose either from cowardice or disaffection, and do therefore unanimously think it their duty, most earnestly to recommend him as a proper object of mercy." M'Arthur on Naval Courts-Martial Append. No. 34. But now, by 19 Geo. III. c. 17, s. 3, a court-martial may either "pronounce sentence of death, or inflict such other punishment as the nature and degree of the offence shall be found to deserve."

* The protection of the statute 24 Geo. II. c. 44, and of similar statutes, extends to all persons in-

Surrey, sent a gun to a blacksmith, between the 20th and 30th of August, 1791, to be mended. The blacksmith having repaired it, kept it some time in his house, but did not use it. The defendant who was lord of an adjoining manor, in which the blacksmith lived, and also a justice of the peace, on the 17th of

tending to act within them. Therefore an excise officer, who, acting as such, receives money for duties under a statute which has been repealed, is entitled to notice under 23 Geo. III. c. 70, s. 30, *Greenway* v. *Hurd*, 4 T. R. 553. "It has been frequently observed by the Courts, that the notice which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." *Per* Lord KENYON, *ibid.* So one magistrate committing the mother of a bastard child is entitled to notice under 24 Geo. II., though two magistrates only have jurisdiction in such case, for he intended to act as a magistrate at the time, however mistakenly. *Wheller* v. *Toke*, 9 East, 364. And where he has authority over the subject-matter of the complaint, although the place where the offence was committed is not within his jurisdiction, he is still entitled. *Prestridge* v. *Woodman*, 1 B. & C. 12; see also *Graves* v. *Arnold*, 3 Campb. N. P. C. 242; *Gaby* v. *Wilts Canal Company*, 3 M. & S. 580; *Theobald* v. *Crichmore*, 1 B. & A. 227; *Waterhouse* v. *Keen*, 4 B. & C. 200.

But where the act in question has not been done in the capacity of justice, &c., and cannot be referred to that character, but is wholly *diverso intuitu*, notice is not required; as where a revenue officer seizes goods not liable to seizure, and takes money to release them, in an action to recover such money no notice is requisite. *Irving* v. *Wilson*, 2 R. R. 444. So in an action against a tax-collector, not in respect of an act done in the execution of his office, but for his neglect to pay over money which he ought never to have taken, he is not entitled to notice under stat. 43 Geo. III. c. 92, s. 70, which provides that no writ or process shall be sued out for anything done in pursuance of that act till after one month's notice. *Umphelby* v. *M'Lean*, 1 B. & A. 42. So where the defendant, who was a justice of the peace, and also mayor of a borough, had received a fee for granting a licence to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not entitled to a notice. *Morgan* v. *Palmer*, 2 B. & C. 729. If it be equivocal in what capacity the party acted, notice should be given, *ibid.* 734.

Replevin is not an action within the statute. *Fletcher* v. *Wilkins*, 6 East, 283.

The case is equally within the statute, where the plaintiff waives the tort, and brings an action of *assumpsit*. *Waterhouse* v. *Keen*, 4 B. & C. 211.*

* [The above note, by the reporters of the original report, supersedes the necessity of reproducing in the Revised Reports the authorities there mentioned. The general enactments as to notice of action are now contained in the Protection of Justices Act, 1848, 11 & 12 Vict. c. 44, ss. 8, 9.—R. C.

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September went together with his own gamekeeper to the blacksmith's house to search for guns and other engines used for the destruction of the game, and finding the gun in question took it away. It was objected at the trial, that the defendant ought to have had a month's notice of the action, according to the stat. 24 Geo. II. c. 44, having acted as a justice of the peace, under the powers given by stat. 5 Anne, c. 14, s. 4, and on that objection the plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, Mr. Justice GOULD, who tried the cause, stated the evidence, and that he was of opinion at the trial, that the defendant was entitled to notice, having acted, though erroneously, in his character of a justice of the peace. And he [115] mentioned the case of *Stiles* v. *Coxe*, Vaugh. 111, in which it was holden, that justices and other officers of the peace, who acted in such official capacity, though wrong, were entitled to have the venue laid in the county where the trespass was committed, by stat. 21 Jac. I. c. 12.

Bond, Serjt. shewed cause:

The principle of *Stiles* v. *Coxe* is applicable to the present case, viz., that justices and other peace-officers are entitled to the favour of the law, where they have intended to act within the line of their authority, but by mistake have exceeded it, under which circumstances, they are to have a month's notice of the action, that they may have an opportunity of tendering amends, and pleading the tender. * *

Adair, Serjt. in support of the rule:

Admitting the proposition that the provisions of the Legislature were intended for the protection of persons supposed to have acted wrong, but in the exercise of a legal authority, yet here, the defendant was not acting as a justice, and cannot therefore avail himself of that character: he acted as lord of the manor, and was attended by his game-keeper. The statutes 22 & 23 Car. II. c. 25, and 4 & 5 W. III. c. 23, are the only Acts which authorize the entering and searching houses for game, and engines for the destruction of game: the first of these

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requires that there shall be a warrant from a justice of peace to the game-keeper to authorise the search; the second, empowers the constable to enter and search, having a similar authority from a justice. But neither of them empower the justice himself personally to enter. The statute 5 Anne, c. 14,* indeed authorizes a justice of the peace to take away dogs, nets or other engines from unqualified persons, but gives him no authority to enter houses: and that act purposely omits guns, which must be used for the destruction of the game, otherwise are not liable to be seized. There is no pretence therefore to say that the defendant in this case acted as a justice; and the Court will not extend the provision of the Legislature, merely because he happened to be a justice of the peace, as well as lord of the manor.

But the COURT said, that though justices of the peace could not avail themselves of their privilege as justices, where they acted in any other capacity which was *diverso intuitu*, yet as in the present case the subject matter was within their jurisdiction, the defendant was to be taken to have acted as a justice, and [116] therefore entitled to notice, previous to the commencement of the action.

Rule discharged.

C. P. MICHAELMAS TERM.

SHEERS *v.* BROOKS AND OTHERS.

1792. *Nov.* 15.

(2 H. Bl. 120—122.)

[120]

Bail above may justify the breaking and entering the house of A. (the outer door being open), in which the principal resides, in order to seek for him, for the purpose of rendering him. Such a justification is good without averring that the principal was in the house at the time. And in such a plea an averment that the defendants "duly became bail and entered into a recognizance" is sufficient, without stating that the principal was delivered to their custody.†

TRESPASS for breaking and entering the dwelling-house of the plaintiff, making a noise and disturbance therein, and staying

* Repealed by 1 & 2 Will. 4, c. 32, s. 1.—R. C.

† The house of the plaintiff was considered, in this case, to be the house of the principal; and therefore the justification of the party entering

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and continuing in the same for a long space of time, to wit, for the space of twelve hours, &c. &c.

[Plea to the effect that the defendant went into that house to look for a person for whom he had become bail, and who resided in the house.]

[121] To this plea there was a general demurrer.

Lawrence, Serjt. in support of the demurrer, made two points of argument:

1st, That it did not appear that the defendants were in a situation to justify the taking of Kempson (the principal) in any place; 2nd, That they had no right to take him in the house of the plaintiff. As to the first he argued, that to entitle bail to take their principal, the principal must have been delivered to them as bail by the Court, 4 Inst. 178; 2 Hawk. P. C. 88, but the plea in the present case, shews only that the defendants were sureties for the appearance of Kempson: it does not state that he was delivered to them as bail by the Court, and the difference between bail and mainprise is obvious. As to the second point, he urged that bail could not, in any event, enter the house of another, to take the principal, unless the principal were in the house at the time: now it is not averred in the plea, that Kempson was in the plaintiff's house at the time of the entry, Cro. [122] Eliz. 876. Nor could such an entry be justified, merely because it was stated that the principal used, occupied and resided in the house, those being vague and equivocal terms, which might be applied to any one who had a temporary residence there, such as a visitor, or servant.

Bond, Serjt. *contrà*:

The defendants were not mainpernors, but bail: the plea states that they "duly became bail:" this allegation is sufficient, and is not contradicted by stating that they entered into a recognizance, &c. As therefore they were bail, they had a right to take

did not depend upon the fact of the principal being within at the time, as it would have done had the house been considered the house of a stranger. See *Hutchinson* v. *Birch*, 4 Taunt. 619: *Cooke* v. *Birt*, 5 Taunt. 765; *Johnson* v. *Leigh*, 6 Taunt. 246.

the principal, and were justified in searching for him at his usual place of abode. And in *Semayne's* case, 5 Co. 91 a, it is laid down, that "the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house."

LORD LOUGHBOROUGH:

This plea appears to me to be good, both in form and substance. It shews that the defendants were bail, and not mainpernors, for it states that they duly became bail and entered into a recognizance, the legal effect of which is, that the principal was in their custody; and a further averment of his being delivered to them would have been unnecessary: when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself; they have a right to be constantly with him, and to enter when they please, to take him. And I see no difference between a house of which he is solely possessed, and a house in which he resides by the consent of another.

GOULD, J.:

I think this plea is good, and sufficiently certain to a common intent, and that the subsequent statement of the entering into a recognizance is not sufficient to invalidate the prior allegation of the defendant's having duly become bail. It seems to me to be the same in effect, as if the principal had been sole occupier of the house; the plaintiff received him into her house, subject to all the legal consequences, to which he would have been liable, if the house had been his. A contrary determination would affect the liberty of the subject, as it would make it extremely difficult to procure bail.

HEATH, J. of the same opinion.

Judgment for the defendants.

C. P. EASTER TERM.

TATEM *v.* CHAPLIN.†

(2 H. Bl. 133—135.)

1793. *May* 3.

[133]

A covenant in a lease that the lessee, his executors and administrators, shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named.

THIS was an action of covenant, brought by the lessor of a farm against the assignee of the lessee, for the breach of the following covenant. "And the said Samuel Norfolk (the lessee), for himself, his executors and administrators, did covenant, promise and agree, to and with the said George Tatem (the lessor), his heirs and assigns, that he the said Samuel Norfolk, his executors and administrators, should and would constantly during that demise, with his and their family and servants, reside, inhabit and dwell in and upon the said demised messuage or tenement, farm and lands, and in default thereof, would pay or cause to be paid to the said George Tatem, his heirs or assigns, the sum of five pounds of lawful money of Great Britain, as a penalty for every month he or they did not or should not reside, inhabit or dwell in and upon the said demised premises, over and above the yearly rent then and there reserved, &c."

The breach assigned was "that the said Richard Chaplin (the assignee) after the said assignment of the said demised premises to the said Richard, and during his possession thereof, to wit, from the 9th day of May in the year of our Lord 1790, to the day of filing the original writ of the said George, hath [*134] not, nor did during such time as aforesaid, *with himself, his family and servants, reside, inhabit and dwell, nor does he now reside, inhabit, and dwell, in and upon the said demised messuage or tenement, farm or lands, but on the contrary hath totally absented himself with his family and servants from the same, for a long space of time, to wit, for the space of two

† Cited and followed as an authority by BLACKBURN, J. in *Williams* v. *Earle* (1868) L. R. 3 Q. B. 739, 750, 37 L. J. Q. B. 231; and by CHARLES, J. in *Fleetwood* v. *Hull* (1889) 23 Q. B. D. 35, 37, 58 L. J. Q. B. 341.—R. C.

years and three months, yet the said Richard Chaplin hath not paid or caused to be paid to the said George Tatem the sum of 5*l.* of lawful money of Great Britain as a penalty for each and every month he the said Richard Chaplin with his family and servants as aforesaid have not resided, inhabited and dwelt, in and upon the said demised premises, over and above the yearly rent so then and there reserved, or any part thereof, but hath therein wholly failed and made default, contrary to the form and effect of the aforesaid covenant of the said Samuel Norfolk, so made with the said George Tatem, in that behalf as aforesaid, &c." To this there was a general demurrer.

There were also issues joined on the breaches of other covenants.

Runnington, Serjt. argued in support of the demurrer, and the only material point of his argument was, that the covenant in question did not run with the land, and therefore did not bind the assignee, who was not named in it, within the principle of the third resolution in *Spencer's* case, 5 Co. 16 a. He also cited *Mayo* v. *Buckhurst*, Cro. Jac. 438; *Brewster* v. *Kitchen*, 1 Lord Raym. 317; *Churchwardens of St. Saviour's* v. *Smith*, 3 Burr. 1271.

On the other side *Bond*, Serjt. contended that the covenant ran with the land, and was binding on the assignee, though not named: that the third resolution in *Spencer's* case related only to personal covenants, and therefore did not affect the present case, but that the first resolution was, "when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words." And the sixth resolution, "If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come, as well those who come to it by act of law, as by *the act of the party, for all is one having regard to the lessor. And if the [*135]

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law should not be such, great prejudice might accrue to him; and reason requires, that they who shall take the benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessee makes it with the lessor." So also in the *Dean & Chapter of Windsor's* case, 5 Co. 24 a, it is laid down, that "such covenant which extends to the support of the thing demised, is *quodam modo* appurtenant to it, and goes with it."

Now in the present instance the covenant clearly extended to the support of the thing demised.

The COURT said, though the deed was very ill drawn, they were clearly of opinion, that the covenant in question was *quodam modo* annexed and appurtenant to the thing demised, according to the first and sixth resolutions in *Spencer's* case, which were directly in point, and therefore that the assignee was bound, though he was not named.

Judgment for the plaintiff.

C. P. MICHAELMAS TERM.

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Nov. 13.

JAMES *v.* SEMMENS, WIDOW.

(2 H. Bl. 213—219.)

[213]

Where two legacies of the same sum are bequeathed to the same person by different instruments, viz., one in a will, and the other in a codicil, the legatee is entitled to both, unless a contrary intention appears on the face of the instruments when read together.*

[215]

[PASCOE SEMMENS (deceased) made his will on the 29th of April, 1790, in the words following :] "In the name of God, Amen, this is the last will and testament of me Pascoe Semmens, of the parish of Ludgvan in the county of Cornwall, Yeoman, First and principally, I commend my soul into the hands of Almighty God my Creator, and my body to be decently interred

* *Vide Lee* v. *Pain*, 4 Ha. 201, 216; *Wilson* v. *O'Leary* (1872) L. R. 7 Ch. 448, 41 L. J. Ch. 342.—R. C.

in the plainest manner possible, at the discretion of my executors hereinafter named; item, I give and bequeath to my wife Katharine Semmens, her executors, administrators and assigns, all that messuage and tenement with the appurtenances, in the parish of Madden, called Malfel, now in the occupation of Thomas Glasson, and which was given to her by her aunt Ursula Friggens, to hold to her and her assigns from my death, during the remainder of the lease or leases thereof, under and subject to such rents, payment, suits and services, as are due and payable thereout, to the lord or lords of the fee. And also I give to my said wife Katharine Semmens whatsoever household goods and furniture were given to her, and come to her, by her said aunt Ursula Friggens; and also I give to her the liberty of continuing in my dwelling-house for a year and a day after my decease, without being liable to pay any rent, or to be molested by my executors hereinafter named, during the said day and twelve months after my death. Item, I give and bequeath unto my said wife Katharine Semmens an annuity of 10*l.* a year, during her natural life, and to be issuing and payable out of my leasehold estate of Trevon in the parish of St. Erth, free and clear of all out-goings whatsoever, and to be paid and payable to her by my executors every year on the 25th of March as long as she lives: the first payment thereof to be made on the 25th day of March, which shall next happen after my death, and be paid home to the 25th day of March pre- [216] ceding her death; and I give her a power of entry and distress upon the said premises called Trevon, if she is not paid regularly in the manner I have above directed." [The testator then gave various small legacies to his relations, and gave the residue to two nephews whom he appointed executors. On the 24th of May, 1790, the testator made a codicil to his will in the words following:] "I Pascoe Semmens, of the parish of Ludgvan in the county of Cornwall, blacksmith, being sick and weak in body, but of a sound and disposing mind, memory, and understanding, do make and ordain this to be a codicil to my last will and testament, and which I do hereby order and direct shall be taken as a part and parcel thereof, and be annexed thereto, after my decease: first, my further will is, and I do hereby give and

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bequeath unto my dearly beloved wife Katharine, during her natural life, in case she shall be living at the time of my decease, the yearly sum of ten pounds, of lawful money of Great Britain, free and clear of all out-goings whatsoever, to be issuing and payable out of my estate called Trevon, situate, lying and being in the parish of St. Erth in the said county of Cornwall, by quarterly payments; the first payment thereof to begin and be made, at the first quarter day of payment, which shall happen next after my decease; and I do hereby charge the said estate of Trevon with the payment thereof, with power to distrain in case of non-payment. Also I do hereby give and bequeath unto my said wife Katharine the estate in Manfel now in the possession of Thomas Glasson, and heretofore given her by the last will and testament of her aunt Ursula Friggens, for and during all the estate, term, time and interest, which shall be to come and unexpired therein, from and after my decease. Also I give and bequeath to my said wife Katharine all that messuage, dwelling-house, gardens, orchards, fields and premises, situate, lying and being in the village of Crowlas in the said parish of Ludgvan, wherein I do now dwell, occupy and enjoy, and now in my possession, to hold to my said wife, to be peaceably and quietly enjoyed by her for and during her natural life only, without molestation of my executors, in my will named; and my further will is, and I do hereby direct, that my said wife Katharine shall have, hold and enjoy all my household goods and furniture, as they shall stand in my dwelling-house at the time of my decease, and my horse and cow, and all other things which shall then be on the said premises (the wheat and cider only excepted), which I do hereby give to her for and during her natural life, and from and after her decease, that then the same shall be delivered up to my executors, in good order and condition. And I do hereby further order and direct, that as soon as conveniently may be after my decease, my said wife, jointly with my executors in my said will named, shall take or cause to be taken an inventory of all my household furniture, china and other goods, chattels and effects, which shall then be in my said dwelling-house only, and that each party shall sign and deliver a copy of the same to each other. In witness whereof, I the said Pascoe

Semmens the testator, have hereunto set my hand and seal, and published and declared this paper writing *as and for a codicil to my last will and testament, and which I do hereby order and direct shall be taken as part and parcel thereof and be annexed thereto after my decease, this 24th day of May, in the year of our Lord 1790." * * * [*217]

[The question which came before the Court on demurrer to a plea to an avowry in replevin, was whether the widow took two annuities or only one.]

Runnington, Serjt. for the widow: [218]

The rule as laid down by Lord THURLOW in *Ridges* v. *Morrison*, 1 Brown, Chanc. Rep. 389, is, that "where a testator gives a legacy by a codicil as well as by a will, whether it be more, less, or equal, to the same person who is legatee in the will, speaking *simplicitèr*, it is an accumulation." And "where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and rejected the accumulation; but where the same quantity is given with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing *primâ facie* should accumulate, the Court has decided in favour of the accumulation." Which doctrine is founded on the case of *Hooley* v. *Hatton*, *coram* Lord Chancellor BATHURST, and the elaborate opinion of Mr. Justice ASTON.† And in Swinburne's Treatise, 526, it is said, "where a certain quantity is twice bequeathed, it is twice due, if in two distinct writings, as in a will and in a codicil."

Lawrence, Serjt. *contrà*:

The codicil contains merely a repetition of the same annuity that is given in the will. The testator shews no intention to give two annuities to his wife, but in the codicil he only varies the mode of payment of that which he had before left in his will, by directing that it should be paid quarterly, instead of yearly:

† Cited at length in a note to *Ridges* v. *Morrison*.

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and he orders that the codicil should be "taken as a part and parcel of his will:" the whole therefore is to be considered as making but one instrument.

In Swinburne, 526, after the passage cited on the other side, it is added, "but if in one writing, it does not make the legacy double," and in the same book 530, it is said "if the testator do bequeath to one man a hundred pounds, and afterwards in the same testament bequeath to the same man a hundred pounds; the second disposition is understood to be but a repetition of the former, and all but one legacy; wherefore the legatary in this case can recover but one hundred pounds, unless he make proof that it was the testator's meaning that he should have two hundred pounds. Or unless where two equal sums be left to one person, the one quantity were left in one writing, and another quantity in another writing, suppose one hundred pounds in the testament, and another hundred pounds in the codicil; for here the legatary may recover two hundred pounds, as two several legacies, except the executor prove the testator's meaning to be contrary." The rule therefore which Swinburne lays down, [219] is subject to the intention of the testator. Here there is no intention whatever to be collected from the instrument, that the testator meant to give two annuities to his wife; "there is no additional cause assigned," according to the doctrine of Lord THURLOW in *Ridges* v. *Morrison*. In that case there was a circumstance which marked the legatee Nicholas Layton, as a peculiar object of favour, namely, the mentioning him as the child whom the testator had put out an apprentice; from which the Court inferred an intention that he should have an additional legacy. But in *Coote* v. *Coote*, 2 Brown, Rep. Chan. 521, Lord THURLOW determined, that where a second codicil was only a repetition of a former one, the legacies were not doubled, and his Lordship said "that when the same legacy is given in a will and a codicil, the Court generally takes it as one legacy," which is agreeable to the judgment of Lord HARDWICKE in the *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636. But besides the apparent intention of the testator arising on the face of the whole will and codicil taken together; it is expressly stated on the record, and admitted by the demurrer, that "the said Pascoe Semmens did

intend by his said will and codicil, to give to the said Katharine one annuity of ten pounds a-year only."

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The COURT held, that the rule as laid down in Swinburne was the true one, viz., that where two legacies of the same sum were given to the same person, one in a will and the other in a codicil, without any circumstances from which the intention of the testator could be collected (the proof of which would be thrown upon the executor), there the legatee would be entitled to both; but that in the present case, it seems clearly to appear from the whole of the will and codicil taken together, that the meaning of the testator was, that his wife should take but one annuity. In the codicil the same annuity was repeated, which was before mentioned in the will: it was charged on the same lands, and the only difference was, that the payment was directed to be made quarterly in the codicil, and yearly in the will. That the decision of the Court was founded solely on what appeared to be the intention of the testator, on the face of the will and codicil together, without adverting to the argument, that the intention of the testator was admitted by the demurrer, which, if it had been necessary, seemed to them to deserve consideration.

Judgment for the plaintiff.

BROOK *v.* WILLET.

(2 H. Bl. 225—234.)

1793. *Nov.* 22.

A prescription for common of pasture for a certain number of sheep on A. every year at all times of the year, is well laid, though the evidence which proves the right of common, proves also that the right is subject to the condition that the sheep are to be folded at night on a certain adjoining farm, after they have fed on the common during the day.

REPLEVIN for taking twenty sheep of the plaintiff at the parish of Mildenhall in the county of Suffolk, in a certain place there called Undley Common, and twenty other sheep at the parish of Lakenheath in the said county in a certain other place called Undley Common, &c. &c.

Non cepit, and avowry.

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[The defendant justified the taking of the sheep on the ground that they were found doing damage to the pasture, in the place where he (the defendant) as tenant of a certain farm called Undley Farm had common of pasture for all commonable cattle (except sheep) levant and couchant upon his farm.

The plaintiff in answer to the avowry set up the enjoyment by prescriptive right, in respect of the messuage and land which he held, of "common of pasture in the said place called Undley Common, in which, &c. for twenty sheep levant and couchant in and upon his said messuage and land with the appurtenances, every year and at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage and land with the appurtenances."

This enjoyment by prescriptive right was in effect put in issue.]

[233] This cause was tried at the last Summer assizes at Bury, before the Lord Chief Justice of this Court, when a verdict was found for the plaintiff, on the traverses of the right of common; the evidence being, that he had a right to common of pasture at all times of the year on Undley Common, but that the tenant of Undley-hall Farm had a right to have the sheep folded on the lands of that farm, when they fed on Undley Common. It was also proved, by an old occupier of the farm, that he had received a compensation from a person who had turned sheep on the common, for not folding them on the farm. And now

Adair, Serjt. obtained a rule to shew cause why the verdict should not be set aside, on the ground that the prescription was not proved as laid, being qualified with the right of the occupier of Undley-hall Farm to have the sheep folded on his lands.

Against which *Le Blanc*, Serjt. shewed cause:

The right of the occupier of the farm was collateral to and distinct from the right of common, and not inconsistent with the prescription on the record. It was not part of an entire prescription, and therefore was not material to be stated. The folding the sheep was a condition subsequent, and not precedent,

to the exercise of the right: and a subsequent condition need not be stated. Thus in *Kenchin* v. *Knight*, 1 Wils. 253, 1 Black. 49, the defendant, to an action of trespass, pleaded a custom for the tenants and occupiers of certain ancient messuages to have a right of common in the *locus in quo*, and under that custom justified the putting in his swine, &c.; the plaintiff in his replication confessed the custom as pleaded to be true as far as it went, but added, that it went farther, *viz.* that the swine should be rung to prevent their rooting up the ground. To this replication there was a demurrer, and it was objected that it was bad, because it did not traverse the custom in the plea, and two contrary customs could not be pleaded; but the Court held the replication good, for it admitted the custom set forth in the plea, and then added another circumstance quite consistent with it, namely, that the swine should be rung, which was rather a [234] qualification of the custom pleaded, than a different one. And in *Griffith* v. *Williams*, Say. Rep. 56, it is laid down, that where two customs are stated, for the breach of which there are mutual remedies it is not necessary for the party traversing the one to take any notice of the other.

Adair, Serjt. for the rule:

The question is, whether the evidence supports the prescription as laid? Now the prescription is stated in a large unqualified manner, but the evidence shews that the right is narrowed, by the condition of folding the sheep on Undley-hall Farm. The allegation therefore is not supported by proof. The cases cited on the other side turned entirely on the forms of pleading, and in none of them was there any question how far the allegations correspond with the evidence. Those cases therefore are not applicable to the present.

The COURT at first seemed to doubt whether the prescription, stating the right of common for the sheep at all times of the year at the free will and pleasure of the plaintiff, did not give him a right to continue the sheep on the common all night; and, if so, it was repugnant to the evidence, which proved that they were to be folded at night on Undley-hall Farm. But upon considera-

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tion, they held that the words "all times" were to be understood according to the subject-matter, and the general course of feeding sheep, which seldom, if ever, remained during the night on the commons on which they were turned out to pasture, but were driven to a fold. The words therefore, "all times" must be taken to mean all usual times. That there were two prescriptions, and that the folding the sheep on Undley-hall Farm, was not part of an entire prescription for common of pasture on Undley Common, but a condition or rather a consideration, subsequent to the enjoyment of the right, and therefore not necessary to be stated; which it would have been, had it been precedent.

And ROOKE, J., mentioned *Gray's* case, 5 Co. 78 b, where, in "replevin between Gray and Fletcher, in bar of the avowry for damage feasance, the plaintiff entitled himself to have common of pasture in the place where, &c. to his copyhold, which custom was traversed. And it was found, that he ought to have the same common, but that every copyholder had used to pay time out of mind, *pro eâdem communiâ, unam gallinam et quinque ova, annuatim*, and it was adjudged, that on this verdict the plaintiff should have judgment; for the plaintiff need not shew more than makes for him, and that is of his part." *

Rule discharged.

1793.
Nov. 23.
[248]

EMERSON, ONE, &c. *v.* LASHLEY.

(2 H. Bl. 248—253.)

No action will lie in this Court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been brought, the Court ordered the costs awarded to the plaintiff in the inferior court, to be deducted by the prothonotary from those allowed to the defendant in the action.†

[THIS was an action of *assumpsit*, and was brought to recover costs ordered by the Lord Mayor's Court to be paid by the

* Cited Cro. Eliz. 563.

† An action will not lie on the judgment of a County Court under the provisions of the County Court Acts:—*Berkeley* v. *Elderkin*, 1 E. & B. 805; *Austin* v. *Mills*, 9 Exch. 288. —R. C.

plaintiff (who was unsuccessful) in an action before that Court. There was a count laying the action on an implied promise; and there were also the common counts.]

The defendant at first demurred generally to the first count, and pleaded the general issue to the others; but the demurrer was afterwards withdrawn, and *non assumpsit* pleaded to the whole declaration. The cause therefore went to trial, and a verdict was found for the plaintiff on the first count, subject to the opinion of the Court on the question whether the action could be maintained?

It appeared at the trial, that the defendant at the time of entering the action and attachment in the Mayor's Court, and also at the time when the present action was brought, was resident out of the jurisdiction of that Court. * * *

[After argument:]

LORD CHIEF JUSTICE EYRE: [251]

If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the Court would think again and again, before they would give it any encouragement. In general, there is another remedy (however that remedy may fail in an inferior Court, whose jurisdiction is local), and the consequence of our determining that an action would lie for such costs as these, would be, that instead of applications to the Court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear that no action can lie for such costs. In * actions brought in superior Courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a Court of competent jurisdiction, that they create debts and duties, upon which actions of debt are founded. General policy and convenience require, that faith should be given to those judgments, and that duties should arise; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the

* This passage of the judgment is cited by DENMAN, J., in *Marbella Iron Ore Co.* v. *Allen* (1878) 47 L. J. C. P. 601, 605.—R. C.

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authority of the Court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the Court that enforces these kind of orders, and the power of the Court will always be regulated by the discretion of the Court, in causes which come before them. I [252] was very much struck with an observation of my brother *Clayton*, that if we suffer an action to be brought for costs thus ordered to be paid in an inferior Court, we must take that order to be final: we give credit indeed to judgments of inferior Courts, because there is a regular course, if those judgments are improper, by which they may be corrected; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to take one of these interlocutory proceedings as final, and if we were to inquire whether the inferior Court had done right, what a new field would be open for investigation! If a superior Court were to take into consideration a cause with which they had nothing to do, and to give judgment whether the inferior Court had done right in making an interloctury order, it would be impossible for any such Court to go on with its ordinary business. The case that comes the nearest to the support of this action, is that of *The King* v. *Chamberlayne*,* where the Court of King's Bench decided, that the costs upon a recognizance to prosecute were in the nature of a debt, which an administrator might claim. But the expressions in that case must be understood according to the subject-matter; properly speaking, those costs were not a debt to any one, for if they were a debt, there was no occasion for a recognizance to enforce the payment of them; the Court indeed held, that the original right devolved from the original party to the administrator, but if it were not a debt to the original party it was not a debt to his representative: the recognizance indeed was merely a security, without which the costs could not have been recovered at all. That case, therefore, rather makes against the argument to which it is applied. Upon the whole, therefore, though there will be a particular inconvenience arising in this case, from the circumstance of the defendant being out of the jurisdiction of the inferior Court, it is

* 1 Term Rep. B. R. 103.

better to oblige the other party to wait, till he can be brought within that jurisdiction, than to produce the mischievous consequences, which would ensue from our determining that this action could be maintained.

GOULD, J.:

I agree with my Lord, according to the rule of law laid down by Littleton and Lord Coke, that it is better to submit to a particular inconvenience, than introduce a general mischief. It is apparent, what an ill use might be made, of our establishing a precedent of this kind. Did any man ever hear of an action in a [253] superior Court to recover costs, where there had been an interlocutory reference to a prothonotary or master? It has been always holden, that an attachment was the proper remedy on the *allocatur*.

HEATH, J.:

I am of the same opinion. The question arises upon an action for costs, given by an interlocutory order, which are not costs given by the Statute of Gloucester. It is a motion in an inferior Court, by a party against his own attorney; the Court, acting upon a power it has over its own ministers, declares the complaint groundless, and inflicts a penalty. As therefore these costs are a penalty, and not given by the Statute of Gloucester, I am of opinion that the action will not lie.

ROOKE, J.:

I am of the same opinion. I think it would be very dangerous to encourage actions of this sort.

Judgment for the defendant.

On a subsequent day, a rule was granted to show cause why the costs awarded to the plaintiff in the Mayor's Court, should not be deducted from the costs to be allowed to the defendant in the present action, and why the prothonotary should not make his *allocatur* after the deduction.

Against which *Clayton* shewed cause by urging that in cases

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where costs had been set off against each other, they were considered as debts, for which there were mutual remedies by action.

Runnington, Serjt. for the rule contended, that the Court might, in their discretion, order the deduction to be made, and cited *Thrustout* v. *Crafter*, 2 Black. 826; and *Schoole* v. *Noble*, 1 H. Bl. 23; he observed also the peculiar hardship the plaintiff would be under, if the application were refused, as he had no remedy to recover the costs given him by the rule in the inferior Court.

The COURT, without hesitation, said it was highly reasonable to allow the deduction, and therefore made the

Rule absolute.

1793.
Nov. 25.
[254]

NICHOLSON *v.* CHAPMAN.

(2 H. Bl. 254—259.)

A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path. A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. A. has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation. But in such a case, in all probability, A. might maintain an action against the owner for a compensation.

THIS was an action of trover, brought under the following circumstance. A considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the Thames, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as Putney, and there left at low water, upon a towing-path within the manor of Wimbledon. Being found in this situation, the bailiff of the manor, one Fairchild, employed the defendant Chapman, to remove the timber with his waggon from the towing-path, which it obstructed, to a place of safety at a little distance. This Chapman accordingly did, and when the plaintiff sent to demand

the timber to be restored to him, refused to deliver it up, unless 6*l.* 10*s.* 4*d.* were paid, which he claimed partly by way of salvage, and partly as a recompense to himself for the trouble of drawing the timber from the water's side to the place where it then lay: but this demand the plaintiff refused to comply with, and did not tender any other sum. [The demand was also attempted to be justified under the custom of the manor, but no such custom was established at the trial;] the LORD CHIEF JUSTICE therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the defendant as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the plaintiff for the value of the timber, subject to the opinion of the Court on the question, whether there ought not to have been a tender of two guineas, before action brought: if the Court should be of that opinion, the verdict to be entered for the defendant, he undertaking to deliver up the timber on payment of two guineas; but if they should be of a [255] contrary opinion, then the verdict to be entered for the plaintiff for the value.

[This question was now argued by *Adair* and *Runnington*, Serjts. on the part of the plaintiff; and by *Bond* and *Clayton*, Serjts. on the other side.]

Cur. advis. vult.

On this day, after consideration, the opinion of the Court was [257] thus delivered by

LORD CHIEF JUSTICE EYRE:

The only difficulty that remained with any of us, after we had heard this case argued, was upon the question whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws * of all civilized nations, the laws of Oleron, and

* This passage is cited by Lord BLACKBURN in *Aitchison* v. *Lohre* (H. L. 1879) 4 App. Ca. 755, 760; 49 L. J. Q. B. 123.—R. C.

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our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice HOLT in the case which has been cited from Lord Raymond and Salkeld.† But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls and leaves it again somewhere upon the banks of the river. [*258] Such an event as this, gives the owner *the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage-feasant, if that should happen to be the case. But this is not a case of damage-feasance; the timber is found lying upon the banks of the river, and is taken into the possession, and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and in truth, with very little trouble. It is therefore a case of mere finding,

† 1 Ld. Raym. 393; Salk. 654, pl. 2.

and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards enforcing the payment.* So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner.† So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating and uncertain amount of the recompense which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer-dog ‡ was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were to be established. The owners of this kind of property, and the owners of craft upon the [259]

* It seems probable that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labour, in which the Court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompence would come properly before a jury.

† It is however laid down, that a mere voluntary courtesy will not support an *assumpsit*. *Lampleigh* v. *Braithwaite*, Hob. 105; and see the Reporters' note, 3 Bos. & Pul. 251. According to the civil law the party is entitled to recover, see Wood's Institute, 256, and see Bull. N. P. 45. Whether the finder of goods is bound to take them into his possession, or if taken into his possession to keep them safely, see *Isaak* v. *Clark*, 2 Bulstr. 312; *Mulgrave* v. *Ogden*, Cro. Eliz. 219.

‡ 2 Black. 1117.

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river which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner seeking to recovér his property in an action of trover will be placed, if he is at his peril to make a tender of a sufficient recompense, before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased: perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the *quantum* of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

Judgment for the plaintiff.

1793.
Nov. 28.
[275]

WORSLEY, Ex parte.

(2 H. Bl. 275.)

The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, must be attested by a notary-public. But the Court will dispense with such attestation, in the case of an affidavit taken before a great judicial officer in Ireland.*

LAWRENCE, Serjt. moved to pass a recovery at the bar, the affidavit of the acknowledgment of the warrant of attorney having been taken at Gibraltar, before a magistrate of that place, but

* See now, for all English purposes, 52 & 53 Vict. c. 10, s. 3.—R. C.

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WORSLEY, Ex parte.

not attested by a notary-public; and in support of his motion, he mentioned that last Term, in the case of the affidavits of an acknowledgment taken before Lord Carleton, the Lord Chief Justice of the Common Pleas in Ireland, the Court dispensed with the attestation of a notary, on an affidavit that the signature was in his Lordship's handwriting. But

The COURT said, that though by the courtesy which subsisted between the two countries, they would take judicial notice that so great an officer as the Chief Justice of a superior court in Ireland was competent to administer an oath, and therefore would be satisfied with a verification of his hand-writing, yet there was a great difference with respect to an ordinary magistrate, and that in such cases, the rule requiring the attestation of a notary-public, ought to be strictly observed.

On hearing this, *Lawrence* took nothing by his motion.

C. P. TRINITY TERM.

GOODALL *v.* SKELTON.

(2 H. Bl. 316—317.)

1794. *June* 28.

[316]

A. agrees to sell goods to B. who pays a certain sum of money as earnest; the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them, but A. declares at the same time that they shall not be carried away till he is paid. This is not a delivery to B.

THIS was an action for goods sold and delivered, in which a verdict was found for the plaintiff, with liberty for the defendant to move for a new trial or a nonsuit, in case the Court should be of opinion, on the report of the evidence, that the action could not be maintained.

The material facts which appeared from Mr. J. ASHHURST'S report, were, that the plaintiff had agreed to sell a quantity of wool to the defendant, that a shilling earnest was paid on the part of the defendant to bind the bargain, that the wool was

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packed in cloths furnished by the defendant for that purpose, and left at a hovel belonging to the plaintiff, and that the defendant was to send his waggon in a few days to take it away. But while the defendant's servant was weighing and packing it, and proposing to the plaintiff to fix the time when the waggon should come, the plaintiff declared that "it should not go off his premises till he had the money for it."

Le Blanc, Serjt. shewed cause against the rule, by contending that as the wool was packed in the defendant's cloths, and deposited in a particular place till his waggon should come and take it away, there was a delivery to him. But the COURT (absent the Lord Chief Justice) were so clearly of a different opinion, that they stopped the counsel on the other side.

BULLER, J.:

In general, in questions of this sort, the usage of trade is resorted to in order to shew whether there has been a delivery or not: as in the case of wharfs and the like. But here the evidence is that the plaintiff peremptorily insisted on not parting with the goods till he was paid; clearly therefore there was no delivery.

[317] HEATH, J.:

The plaintiff seems to me to have countermanded the delivery of the wool.

ROOKE, J. of the same opinion. The plaintiff had a right over the goods at the time, and if so, they were not delivered; for if they had been delivered, that right would have been in the defendant.

Rule absolute for a nonsuit.

LYNN AND ANOTHER *v.* BRUCE.

(2 H. Bl. 317—319.)

1794. *July* 1.

[317]

A. declared that in consideration that he at the request of B. had consented and agreed to accept and receive from B. a composition of so much in the pound upon a certain sum of money owing from B. to A. in full satisfaction and discharge of the debt, B. promised to pay the composition; this was not a good consideration to support an *assumpsit* against B., a mere accord not being a ground of action.*

THIS was an action of *assumpsit.* The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for 200*l.* The second was as follows: "and whereas also afterwards, &c. in consideration that the said Robert and Thomas (the plaintiffs) at the special instance and request of the said Charles (the defendant) had then and there consented and agreed to accept and receive, of and from the said Charles, a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and two pence, then due and owing from the said Charles to the said Robert and Thomas, upon and by virtue of a certain other writing obligatory, bearing date, &c. made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them, in the sum of two hundred pounds, in full satisfaction and discharge of the said last mentioned writing obligatory, and all monies due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, upon request; and the said Robert and Thomas in fact say, that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, amounted to a large sum of money, to wit, the sum of seventy three pounds thirteen shillings and six-

* Cp. and dist. *Good* v. *Cheesman* (1831) 2 B. & Ad. 328.—F. P.

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[*318]

pence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, *on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last mentioned sum of seventy-three pounds thirteen shillings and sixpence, the amount of the said last mentioned composition, yet the said Charles not regarding, &c. hath not yet paid the sum of three pounds seven shillings and sixpence, being the residue of the said sum of seventy-three pounds thirteen shillings and sixpence, the composition last aforesaid, or any part thereof, &c."

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count, and after argument the opinion of the Court was thus delivered by

LORD CHIEF JUSTICE EYRE:

This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is, that in consideration that the plaintiff at the defendant's request, had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105*l.* 5*s.* 2*d.* due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for 200*l.*, in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred, that the composition amounted to 73*l.* 13*s.* 6*d.*, and that the defendant had paid the plaintiff 70*l.* 6*s.*, part thereof. The breach is, that he did not pay 3*l.* 7*s.* 6*d.* the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, on an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration. If it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of *Allen* v. *Harris*, 1 Lord Raym. 122, upon

consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said, that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, "overthrow all the books." It was added, that if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. *Interest reipublicæ ut sit* [319] *finis litium:* accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Roll. Abr. title Accord, pl. 11, 12, 13, is, because the plaintiff hath not any remedy for the whole, or where part has been performed for that which is not performed; which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages, for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts, before it can produce legal obligation or legal effect, that in *Peyton's* case, 5 Co. 79 b, it was holden, that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Roll. Abr. that an accord executory in any part, is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar. But put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

1794.
July 9.
[319]

NAISH *v.* TATLOCK AND OTHERS, ASSIGNEES OF LEDIARD A BANKRUPT.

(2 H. Bl. 319—324.)

A tenant from year to year of a house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy.†

IN this action for use and occupation, the first count of the declaration stated that the defendants "were indebted to the plaintiff in the sum of seventy pounds of lawful money of *Great Britain, for the use and occupation of two counting houses, one dining room, and one chamber, parcel of a certain messuage or tenement with the appurtenances, of the plaintiff, situate &c. before that time used, occupied, possessed and enjoyed, as well by one Thomas Lediard, whose term and estate therein the defendants afterwards had, as by the defendants, at their special instance and request, for a long space of time then elapsed, from and under, and as tenants thereof respectively, to the plaintiff, and by her permission; and being so indebted, the defendants undertook, and to the plaintiff faithfully promised to pay, &c." The second count was on a *quantum meruit* for the same use and occupation by Lediard, "whose estate, term and interest the defendants had," and by the defendants. There were also the common counts. The general issue was pleaded, and 12*l.* paid into Court. After argument and time taken to consider, the judgment of the Court was thus given by

[*320]

LORD CHIEF JUSTICE EYRE:

The verdict passed for the plaintiff in this cause, subject to the opinion of the Court on the matter of law, arising upon the facts appearing in evidence and found by the jury, con-

† This case is retained merely for the exposition of the nature of the claim for use and occupation under the statute of 11 Geo. II. (c. 19, s. 14). As to the trustee in bankruptcy, his position has been much changed by the disclaimer clauses in later Acts. See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 55); *Gabriel* v. *Blankenstein* (1884) 13 Q. B. D. 684 (a decision under the Act of 1869).—R. C.

sidered with reference to the declaration. It is stated in the first count of this declaration, that the defendants were indebted to the plaintiff in seventy pounds, for the use and occupation of certain apartments in his house before that time used, occupied, possessed, and enjoyed, as well by one Thomas Lediard, whose term and estate therein the defendants afterwards had, as by the defendants at their special instance and request, for one year then elapsed, from and under, and as tenants thereof respectively to the plaintiff, and by her permission, and that being so indebted, they promised to pay. The second count is upon a *quantum meruit*, in consideration that the plaintiff at the like special instance and request of the defendants, had permitted the said Thomas Lediard, whose estate, term, and interest, the defendants had as well as the defendants themselves respectively, to have, use, and occupy the same apartments, and that Lediard and the defendants respectively, had accordingly had, used, and occupied the same for a year, by such permission of the plaintiff. The material facts of the case were, that after Lediard had occupied these apartments for a certain part of the year under an agreement to pay seventy pounds a year for them, he became a bankrupt, and the defendants, who were his assignees, then entered into possession and continued in the [321] occupation of them for the rest of the year; and that after the expiration of the year, Mr. Tatlock, one of the defendants, wrote the following note to Mr. Ward, the solicitor for the commission of bankrupt against Lediard; "Mr. Tatlock's respectful compliments to Mr. Ward, the bearer is a Mrs. Naish, a widow lady, whom Mr. Lediard rented his house in Austin Friars of; there is due to her for rent, fifty pounds, we having paid her twenty pounds since the commission, there is also five pounds fifteen shillings and sixpence for coals likewise for our use since the commission; now I wish you to give an order upon Mr. Tatlock for the above, as we certainly are bound to pay her. London, 20th July, 1792." This paper was delivered to Mrs. Naish the plaintiff, by Tatlock, to be delivered to Ward, and it was delivered, but some dispute arising, the fifty pounds were not paid, in consequence of which this action was brought, and then a proportion of the annual rent of seventy pounds for that

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part of the year during which the defendants were in the occupation of the premises, was paid into Court. Upon this state of facts, it was insisted, on the part of the defendants, that the plaintiff had not proved her case stated in the declaration. The question was saved for the opinion of the Court, after it had been left to the jury to say distinctly, whether the agreement was or was not to pay the rent annually, which they found in the affirmative, and whether the seventy pounds mentioned in the note of the 20th July, 1792, was the year's rent, or was a sum which the defendants had agreed to pay for their own occupation; as to which the jury found, that it was the rent for the whole year, including the time of Lediard's occupation. At the trial, I was strongly inclined to agree in opinion with Mr. Tatlock, that the real merits of the case were on the side of the plaintiff. It was at the same time apparent, that they were very much entangled and brought into great hazard in this form of action. This induced me strongly to recommend a compromise between the parties, which has not been acceded to; we are therefore called upon to decide the strict question of law, and after having heard a very full discussion of this case from the Bar, and taken time to consider of it, we find ourselves obliged to pronounce that the evidence on the part of the plaintiff is not sufficient to maintain this action. It is stated in both the counts, of which I have given an abridgment, that [322] the plaintiff's demand is founded upon a use and occupation by Lediard for a part of the year, and by the defendants for the residue of the year, both occupations being had by the permission of the plaintiff, at the special instance and request of the defendants. These latter words, often mere words of form, are here words of substance and operative, connecting the occupation of the defendants, for which they were bound to make a satisfaction, with the occupation of Lediard, a stranger, for whose occupation, *primâ facie* at least, the defendants were not bound to make a satisfaction. In point of fact, it was not at the request of the defendants, that Lediard was permitted to occupy; the defendants had no relation to Lediard, but as his assignees, and that relation did not commence till the close of his occupation; that relation therefore, alone, could not have the effect of

making them personally liable to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the request of the defendants, is therefore substance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration seems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration, the words "whose term and estate therein" in the first count, and the words "whose estate term and interest" in the second, the defendants had. This very loose and general averment seems to have been calculated to facilitate the passage of the other averment "of the defendant's request" through the cause at *nisi prius;* and if it had passed smoothly there, would probably have been the averment which would have been relied upon after a verdict, and this last would have been discarded. Loose, informal, and indistinct as it is, it might serve to introduce at the trial, that Lediard was a tenant for a year at a rent of seventy pounds payable at the end of the year, and that the assignees having entered into possession as assignees, entered under that demise and became assignees of the lease, and bound to pay the rent which became due after the assignment. It might then be with great colour urged, that rent due is recoverable in an action for use and occupation, and if the rent is really due, the manner of stating the use and occupation seems to have more form than substance in it. I was for a time inclined so to consider the case, but upon further consideration of the nature of the action for use and occupation, and of the scope and purview of the statute 11 Geo. II. [c. 19, s. 14] we are of opinion, that the circumstances under which the defendants succeeded to the occupation of the premises will not [323] prove or dispense with the proof, that Lediard's occupation was at the request of the defendants. The action for use and occupation is in its own nature collateral to the action on a contract for rent upon a demise, and it was so holden in the case of *Johnson* v. *May*, 3 Lev. 150: if the defendant did in fact use and occupy by the permission of the plaintiff, and had expressly promised to pay, though the plaintiff had no title or perhaps an equitable title only, the action lay.

Under the statute, a landlord who has rent owing to him is

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allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that if the demise be produced against him it shall not defeat his action, as it would have done before the statute, but the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. What is given by this statute? A reasonable satisfaction for the use and occupation, is the thing intended to be given, the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the Act, to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due, by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. In the case now under consideration, the plaintiff must be left to such other remedy as she may be advised to pursue: she cannot recover in an action for use and occupation without proof of the use and occupation alleged, and if she can recover at all in this form of action, against one man for use and occupation by another, (as to which we give no opinion,) it must be upon the ground of that occupation having been permitted at his request, and that request [324] must be proved. The consequence is, that a nonsuit must be entered, and the postea delivered to the defendants.

Postea to the defendants.

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(2 H. Bl. 324—334.)

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July 9.

[324]

TROWARD *v.* CAILLAND.

IN ERROR.

(6 T. R. 439—442; and in House of Lords, 8 Brown, P. C. 71—84.)

If, after a grant of the next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the King is entitled to present; the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee.

[THIS was an action of covenant on a covenant for title contained in an indenture, being a bargain and sale of an advowson. It appeared that before the date of this indenture, Sir Kenrick Clayton being then owner of the advowson, granted the then next presentation to Matthew Kenrick, Esq. Between the date of this grant and that of the indenture first above-mentioned, the living had become vacant by the promotion of the incumbent to a bishopric, whereupon the King by his prerogative became entitled to present to the living, and presented the Rev. Matthew Kenrick to the living: subsequently, the living being then filled by the Rev. Matthew Kenrick, Matthew Kenrick, Esq., granted and assigned to the Rev. Matthew Kenrick the next presentation. The question was whether the Rev. Matthew Kenrick thus became entitled to the next subsequent presentation. If that were so, the covenant for title in the subsequent conveyance of the advowson was broken and the plaintiff would be entitled to recover. The question was raised by demurrer to the declaration in which the whole of the facts were set forth.

In the argument on the demurrer

Bond, Serjt. on behalf of the defendant contended that]

The term *next* presentation must be taken to mean, on the face of the grant, the presentation on the first vacancy that should happen, or none at all: but the presentation on the first vacancy was satisfied by the King's prerogative, which prevented [328]

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the grant from taking effect. That this is the true construction of the grant appears from 1 Bulstr. 26; *Starkey* v. *Poole*, 7 Co. 28 a; *Baskervile's* case, Bro. Abr. tit. Present. al Eglise, pl. 52; Co. Litt. b; Dyer, 35 a; and the case cited in the margin, Mich. 9 Jac. in C. B. Cro. Jac. 691, *Woodley* v. *The Bishop of Exeter*, Winch. Rep. 94, S. C. If the case of *The Grocers' Company* v. *The Archbishop of Canterbury** be cited on the other side, it is to be observed that in that case the authority of *Woodley* v. *The Bishop of Exeter* and the former cases is not expressly denied, but the [329] Court proceeded on the ground that the act of law did not work an injury; there was no question there as to the construction of a deed, containing a grant of the next presentation as fully, freely, &c. as the grantor himself had it. There is therefore a material difference between that case and the present.

Le Blanc, Serjt. *contrà*:

In the cases cited on the part of the defendant, except that of *Woodley* v. *The Bishop of Exeter*, there was no question as to the prerogative of the Crown, but the grantee of the next presentation, having neglected to take advantage of the first avoidance, was holden to have lost his turn by his own laches. Those cases are therefore inapplicable to the present. With respect to *Woodley* v. *The Bishop of Exeter*, it appears from comparing the two reports of it in Cro. Jac. and Winch, that the Court were inclined to be of opinion that the King had no right to present to a living on the promotion of the incumbent to a bishoprick, unless he were the patron of the living. But the law is now clearly otherwise; this therefore takes off from the authority of the other point there said to be decided, viz. that the grantee of the next avoidance must have the next or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishoprick. And that authority is expressly contradicted by the anonymous note in the margin of Dyer, 228 b (which is apparently the same case) where it is stated that the Court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the

* 2 Black. 770; 3 Wils. 214.

King, which excluded him from the first presentation, injures no one." If that note alludes to *Woodley* v. *The Bishop of Exeter*, it throws a doubt on the authenticity of the reports of that case in Croke and Winch; if it does not, it shews that the Court within a very short time decided the same point in a different manner: and being inserted among the notes of Chief Justice TREBY, it seems to prove that it was agreeable to his opinion.

It is true that in Co. Litt. 478 and 9, cited on the other side, it is said, that "If a man seised of an advowson in fee by his deed granteth the next presentation to A., and before the church becometh void, by another deed grant the next presentation of the same church to B., the second grant is void, for A. had the same granted to him before; and the grantee shall not have the second avoidance, by construction to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance doth not import the second presentation." Now in the case there put, the grantor having by his own act [330] parted with the next presentation, has it not in him to grant. But Lord Coke goes on, "But if a man seised of an advowson in fee take wife, now by act in law is the wife entitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation which he might lawfully grant: and so note a diversity between a title by act in law, and by act of the party; for the act in law shall work no prejudice to the grantee." Now this distinction is applicable to the present case, the prerogative presentation of the Crown being an act in law. And this principle was fully recognized in *The Grocers' Company* v. *The Archbishop of Canterbury*. The case too of *The Bishop of London* v. *The Mercers' Company*, 2 Stra. 925, proceeded on the ground of its being a clear rule of law, that the prerogative presentation of the Crown, on the incumbent being created a bishop, did not break in upon any right to present by turns.

Cur. advis. vult.

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LORD CHIEF JUSTICE EYRE:

The merits of this demurrer depend upon the question, whether the grant of the next presentation, donation and free disposition of and to the rectory of Bletchingley, is either satisfied or disappointed by the next presentation happening to be a prerogative presentation, or an avoidance in consequence of the incumbent being made a bishop. The case has been argued on the part of the defendant, upon a nice and literal construction of the grant against good sense and the plain intent of the parties to it. It is said that the grant being of the *next* presentation, the grantee can take nothing but the next presentation, and consequently if he cannot take *that*, he can take nothing. It is said likewise that the *next* is the *first*, and that a grant of the next is not a grant of the second, or that which is not the next; and literally it certainly is not. But the language of a deed is to be expounded between the parties to it, and with reference to the subject matter of it. As between the grantor and grantee, where every thing is to be taken against the grantor, that his grant may take effect, is not this a grant of the first presentation, which it belonged to the owner of the inheritance of this advowson to make, and which he could lawfully, or at least could [331] by possibility make? The whole title being by law subject to a prerogative presentation paramount, or rather collateral to it, which suspends the effect of it, and prevents it from being productive for a time, and which is founded on the general law of the land, of which all take notice, and by which all are bound, could this prerogative presentation have been in the contemplation of the parties to this contract, unless for the purpose of being tacitly excepted out of it? And shall the general law of the land, contrary to one of its most established maxims, work to the prejudice of the grantee, by a strict and literal exposition of the words of the grant?

Grant imports covenant; and shall the grantor be construed to have contracted and bound himself to do that which by no possibility he could do, to grant that which by no possibility he could have to grant, and which both parties knew, at the time of the grant, that by no possibility he could have? A man may certainly take upon himself to grant that interest

which is not in him, which he has not to grant; but ordinarily it will be an interest of such a nature, that by a possibility he might have it.

It was argued that the grantor of the next presentation might, by using other words, have effectually granted the next presentation which it should belong to the owner of the inheritance to make. Suppose he had said *his* next presentation, instead of *the* next presentation; no circumlocution could express with more certainty what it was that he meant to grant. We are then to examine the difference between the effect of the word *his* and that of the word *the*. I admit that the difference would be of great importance in some cases. If for instance, in an action of trespass for taking goods, the plaintiff were to state in his declaration, that the defendant had taken *the* goods, instead of *his* goods, it would be a fatal objection on the record, because it is necessary in such an action for the plaintiff to shew that *his* goods have been taken. But if a man bargains and sells *the* goods described in the bill of sale, it will amount to the same thing as if he had said *his* goods. It is certainly true, that deeds are to be expounded with more strictness than wills, or other writings framed with less solemnity; but this strictness chiefly regards the technical sense of law terms: it never was the rule of construction of deeds, that the words were to be taken in their literal or grammatical sense, if the plain intent and meaning of the deed demanded that they should be understood in any other [332] sense which the words would bear.

It must be admitted, that the exposition of this grant of the next presentation of the rectory of Bletchingley attempted by the defendant, receives great countenance from the case of *Woodley* v. *The Bishop of Exeter*, reported in Cro. Jac.,* and in Winch; † there, the plaintiff entitled himself by a grant of the next avoidance of the church. The incumbent was created a bishop, and had a *commendam* for six years, and according to the report of the case in Winch, after the six years the King presented, and then the incumbent died, whereby the church became void and the plaintiff presented. The Court, consisting of HUTTON, WINCH, and HOBART, held, that when the incumbent is created a bishop,

* Cro. Jac. 691. † Winch, Rep. 94.

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if the grantee of the next avoidance do not then present, he hath lost his presentation, for he ought to have the *next* avoidance, and can have no other, and that if the next avoidance should be taken from him by a former title (except in dower only), statute, or by any other title whatever, he hath lost it for ever, for he cannot claim any by the grant, but the next; and they denied the case put by Lord Coke, Co. Litt. 379 a, that if one deviseth the third avoidance and dies, and the *feme* recover the third, the devisee should have the fourth. According to the report in Croke, HOBART said, that the presentee of the King being in the next turn after the grantor, the grantee hath no remedy, but must suffer the prejudice by reason of the prerogative. In Winch's report of this case, Bro. Abr. tit. Present, pl. 52, is cited, "If a man grant the next presentation to A. and afterwards and before avoidance he grants the next presentation to B., the second grant is void, for it was granted over by the grantor before; and the second grantee shall not have the second presentation, for the grant does not import that." I agree that this case is law. Every grant may be defeated by an elder title. Perhaps dower is an elder title, and therefore we are not bound to maintain the case in Co. Litt. which is denied in *Woodley* v. *The Bishop of Exeter* to be law. If a man has not in him, in point of title, the thing which he grants, it is apparent that his grant cannot take effect. The fallacy of the argument is in the application of this doctrine to the case of a prerogative presentation intervening, which ought not to [333] be considered as a presentation by an elder title, but as arising out of a prerogative right collateral to the title, operating not to defeat but to suspend the title, leaving every thing derived out of the title, or in any manner connected with it, to remain *in statu quo*. The King presents, not by reason of title to the advowson, but *ratione prærogativæ suæ*.

These observations furnish an answer to the case of *Woodley* v. *The Bishop of Exeter;* but *Winch*, who argued that case, puts a case which he admits to be law, and which is of itself sufficient to overturn that case. "I grant," says he, "that if two coparceners had an advowson and the eldest presented, and then she granted the next avoidance, that in this case the grantee

shall have the next which may be granted, and the reason is, because she may not dispose of the estate of another." In order to reach the conclusion that the grantee shall have the next which the eldest could grant, it will be necessary to construe the grant of the next avoidance to be not literally a grant of the next avoidance, but of the next to which the grantor could lawfully present. This construction must be grounded upon the intent of the parties, and upon those rules stated by Lord Coke, Co. Litt. 183. "Quælibet concessio fortissimè contra donatorem interpretanda est, et legis constructio non facit injuriam." If we inquire further into the effect of a prerogative presentation upon the title of the advowson, independent of the question of construction of the grant of the next presentation with which it is entangled in this case, we shall find, as I collect from some inquiries that I have made, that a prerogative presentation to a church of which the advowson is in common, has not in practice passed for the turn of the otherwise rightful patron. Instances have occurred in London, where the union of churches has occasioned a distribution of turns to present, and we all remember that in the case of *The Grocers' Company* v. *The Archbishop of Canterbury*, 2 Black. 770, the point was solemnly adjudged. In that case, all the principles which govern this case, except as to the construction of the grant, are recognized. It is there stated, that the prerogative right of presentation is not a right of patronage, not a right of eviction, nor an usurpation, but a contingent casual right arising upon a particular event; that it does not supply but only suspends or postpones the turn of the patron, and of all the patrons if more than one, and does not take away the right of one and leave the rest entire, which, say [334] the Court, would be rank injustice, and this being the act of law, *nemini facit injuriam.* To this nothing can be added, there must be therefore

Judgment for the plaintiff.

1795.
Nov. 13.
[6 T. R. 439]

TROWARD *v.* CAILLAND.

IN ERROR.

(6 T. R. 439—442.)

[The case was brought, on error, into the King's Bench, and argued upon similar lines to the argument in the Common Pleas.]

[6 T. R. 441] After the first argument Lord KENYON, Ch. J. expressed a strong opinion in favour of the defendant in error: but a second argument was awarded at the desire of the plaintiff in error; however when it was called on in the paper to-day, his counsel intimated that no farther argument was intended here; and the Court unanimously confirmed the judgment of the Common Pleas.

LORD KENYON, Ch. J. now said:

I have looked into all the cases that were cited on the former day, and concur in opinion with the Court of Common Pleas. I think that this case may be distinguished from that of *Woodley* v. *The Bishop of Exeter*. I am inclined to give all the weight that belongs to the opinions of such learned judges as those who are supposed to have determined that case; Lord Ch. J. HOBART, Mr. J. WINCH, and Mr. J. HUTTON. But it is rather extraordinary that Lord HOBART has not recorded that case in his excellent volume of reports. The cases in Winch are in general well reported; but in the preface to Benloe's and Dalison's Reports it seems as if those were not really the reports of Sir H. Winch; for it is there said, "the book called Winch's Reports, but improperly enough ascribed to that learned Judge." And indeed it appears that several of the cases in that book were decided after Sir H. Winch's death. That case however cited from Winch differs from this; that was merely a gift of the next turn; and if that turn were taken by some other person, the gift was defeated: but this was a grant for, what the law calls, a valuable consideration; and it was not intended that the deed should be frustrated by the prerogative of the Crown interfering. It was a maxim adopted by Lord Coke that the words of a deed

should be taken most strongly *contra proferentem:* here the grantor intended to convey to the grantee an absolute right; it was an intention that he might lawfully carry into execution, and we should not give effect to the legal intention of the parties, if we did not decide in favour of the defendant in error. The only thing that seems to be in our way is the *case in Winch; and that for the reason already given does not control our judgment in this case.

[*6 T. R. 442]

ASHHURST, J. declared himself of the same opinion.

GROSE, J.:

In the case of *Woodley* v. *The Bishop of Exeter*, Lord HOBART meant to rely on the intention of the testator; for he said (Winch, 99) "when he gave him the first, it is idle to say that he shall have the second, for that departs from the meaning of the words; and in every grant the law implies *quantum in se est*, and no man may say that the devisor did intend to warrant that from ancient titles." So that that case is distinguishable from the present; for this was the case of a purchase, and the grantor intended to warrant the presentation against all other titles. Besides which, Lord Ch. J. De GREY in 2 Bl. Rep. 774, speaking of the case of *Woodley* v. *The Bishop of Exeter*, said, "that case is not clearly settled to be law: see Dyer 228, in marg." Now the marginal note in Dyer is directly contrary to the case of *Woodley* v. *The Bishop of Exeter*. And though there is great weight in the observation made on that note by the counsel for the plaintiff in error, yet as those notes were added by Ch. J. TREBY, it cannot be doubted but that there was some case to the effect there stated, though Ch. J. TREBY might be mistaken as to the precise time of that determination: and that case is founded on a clear and undisputed principle, that the law will not do an injury to any person.

LAWRENCE, J.:

In Winch's Entries, p. 877, the terms of the devise in the case of *Woodley* v. *The Bishop of Exeter* are stated, "dedit et legavit cuidam Johanni Basset filio suo primam et proximam ad-

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vocationem prædictæ ecclesiæ de L. quæ primo et proximè contingerit post mortem ipsius Arthuri;" which expressly confine the power of presenting to the first turn; and therefore the words of that case distinguish it from the present.

Judgment affirmed.

1796.
May 16.

TROWARD (PLAINTIFF IN ERROR) *v.* CALLAND (DEFENDANT IN ERROR).

(In the House of Lords, 8 Brown, P. C. 71—84.)

[The plaintiff in error then brought this writ of error returnable in Parliament.]

[8 Br. P. C. 77]

In his printed case the plaintiff in error stated the following reasons for reversing the judgments of the Courts of Common Pleas and King's Bench:

First, Because the next presentation to a church is at law grantable, though it be subject to the interception of the prerogative.

Second, Because all deeds which are expressed in clear unequivocal terms, ought to be construed agreeably to the import of the terms in which they are expressed, and the rule that *verba fortius accipiuntur contra proferentem* is a rule not to be resorted to until every other rule of construction has been unsuccessfully applied. Lord Bacon's Max. Reg. 3.

Third, Because the right to the next presentation being subject to the interception of the prerogative, involves a contingency which must necessarily influence the terms of the contract of the purchase of such right; and he who contracts for the first and next presentation, contracts for it as he would for the perpetual advowson, which is but a succession of rights of presentation, subject to every contingency to which it is liable by operation of law.

Fourth, Because the grantee of the first and next presentation claiming from a person entitled to grant the same, is not only upon principle, but also upon the authority of adjudged cases, excluded from claiming any other than the first and next

presentation, *Woodley* v. *Bishop of Exeter*, Cro. Jac. 691. Winch's Rep. 94.

Objection first.—But it is objected by the defendant in error, that a grant of the first and next presentation must be construed to mean the right to present to the first and next avoidance to which the grantor would himself have been entitled to present, for that an act of law shall not work prejudice to the grantee, and a passage in Co. Litt. 379 (*a*), and a note in Dyer, 228, are referred to.

Answer.—The grantor had a right to grant the next presentation in the manner in which he was entitled to it himself at the time of the grant, that is, subject to the interception of the prerogative, and in the present case the grantor hath granted it in words suitable to the intention of granting it in such manner as he was entitled to it himself; to attribute to him the purpose of granting a larger interest than the words of his grant, in their common and technical acceptation, import, is not to expound but to extend his grant; and as to the rule *lex nemini facit injuriam*, the plaintiff in error does not feel it necessary to controvert the existence of the rule, but objects to the application of it to a contract, the terms of which must have been in some degree influenced by the possible interception of the prerogative. *With [*8 Br. P. C. 78] respect to the case referred to by Lord Coke in illustration of the rule, the plaintiff in error observes, that it was in the above case, *Woodley* v. *Bishop of Exeter*, Cro. Jac. 691, denied to be law: and as to the case stated in margin of Dyer, 228, it appears to be a short anonymous note of a case in M. 19 Jac. whereas judgment was not given in the case of *Woodley* v. *Bishop of Exeter* until Mich. 22 Jac. The plaintiff in error admits, that the case of *Woodley* v. *Bishop of Exeter* is entered on the roll, 18 Jac. and that the pleadings are of that date; but if the case referred to by Chief Justice TREBY (the note of which he could not himself have taken) be *Woodley* v. *Bishop of Exeter* and others, the plaintiff in error submits, that it is remarkable that the judgment given in that case should be so differently stated: but the plaintiff in error, considering the record of the judgment as the best criterion of what it really was, has searched for and found the same to agree in substance and in date with the report of Croke and Winch; the plaintiff in error therefore

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submits, that if the case referred to by Chief Justice TREBY, be the case of *Woodley* v. *Bishop of Exeter* and others, that the note in the margin of Dyer is erroneous; and if the case so referred to by Chief Justice TREBY be not the case of *Woodley* v. *Bishop of Exeter* and others, but a different case, determined M. 19 Jac. that the subsequent judgment, M. 22 Jac. in the case of *Woodley* v. *Bishop of Exeter* and others, has overruled it.

Second objection.—But the defendant in error insists, that the authority of the case of *Woodley* v. *Bishop of Exeter*, is considerably weakened by the decision of the case of *The Grocers' Company* v. *The Archbishop of Canterbury*, 2 Bla. Rep. 770, in which case it was held, that the prerogative presentation to a church, of which the advowson was held in common, does not pass for the turn of the otherwise rightful patron, and that the learned judges stated that the case of *Woodley* v. *Bishop of Exeter* was not clearly settled to be law.

Answer to second objection.—It is observable that the learned judges, in giving judgment on the above case of the *Grocers' Company*, remarked, that if the case of *Woodley* v. *Bishop of Exeter* be law, it was very different from the case before them, the latter being a general right of patronage, the former only a grant of the next avoidance, which they admitted in strict construction cannot extend to a second or other subsequent vacancy; and as to the doubt respecting the authority of *Woodley* v. *The Bishop of Exeter*, it was founded upon the note in Dyer, to which the plaintiff in error has already adverted; and on the case of *Evans* v. *Askwith*, Sir W. Jones' Rep. 158, which upon perusal will appear to have no relation to the present question, but to have turned upon a very distinct question, namely, whether a dispensation to hold *in commendam* was a presentation?

Third objection.—The defendant in error further objects, that the judgment in the case of *Woodley* v. *The Bishop of Exeter*, ought not to govern the present case, the party in that case [*8 Br. P. C. 79] *claiming the next presentation not as grantee under a deed but as devisee under a will, and the devise being not of the first and next presentation, but of the first and next presentation which should first and next happen.

Answer to third objection.—The plaintiff in error submits, that in the construction of a deed much more strictness prevails than in the construction of a will, and that if the words first and next presentation in the construction of a will, could not be so construed as to extend to the second or any subsequent presentation *à fortiori*, they cannot receive such construction in a deed; and as to the words "which should first and next happen," the plaintiff in error submits, that they express no more than the preceding words first and next presentation necessarily imply, *et expressio eorum quæ tacite insunt nihil operatur.*

In affirmance of the judgments of the Courts below the defendant in error assigned the following reasons:

1.—The question made on this record is, Whether the grant of the next presentation to Matthew Kenrick "to present one fit and able person to the rectory of Bletchingley, and all other things which should be requisite to be done in and about the premises, to do and accomplish as fully, freely, and entirely as the grantor or his heirs might or could do, or have done, if the grant had not been made," is a subsisting incumbrance on the advowson, and still in force; or whether it is defeated by the vacancy which has happened by promotion since the grant, and which has been filled by the King's prerogative?

The person seised in fee has in him the whole estate of the advowson, that is, the entire and absolute right of patronage; he can grant the whole or a part of that estate which he has, but he can neither grant, nor can be supposed to grant, or to have intended to grant, that which he neither has, nor which, in his own contemplation, or in that of others, can be supposed to have had. The prerogative right to present on promotion to a bishopric is no part of that estate which a grantor can have, or can assume, or be supposed to have. It has been held not to be "a right of patronage, but a contingent casual right arising upon a particular event, viz. the incumbent's becoming a bishop." This contingent casual right of the King, which forms no part of the estate, even of that grantor who has in him the whole estate of the advowson, cannot be the thing intended to be granted, or taken to be so by either party to the grant. Where the thing intended to be granted is the very next presentation, as, if a man

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grant the next presentation to A. and afterwards grants the next presentation to B., in that case, though the grantor had it not at the time of the second grant, he assumed to have it and to grant it, the grant therefore cannot extend to and pass a presentation subsequent to the first, no other than the first being at all in the contemplation of the parties. This is substantially the reason assigned in Brooke's Abridgment, and in Coke upon Littleton. So neither can the party take the *second when he might and ought, by the grant, to take the first: But in the present case he could not take the first; nor can the grant import the King's right of presentation as the thing granted; and if it does not import the next presentation, which would belong to the person seised in fee, and which only he could therefore assume a power to dispose of, the grant in this event is made to import nothing. This distinction seems to have been taken by WINCH, Justice, in the case of *Woodley* v. *The Bishop of Exeter*, for he says, (speaking of the devise in that case), "it is punctually expressed that he shall have the first, and that shall not extend to the first which may be granted; but," WINCH further says, "I grant, if two coparceners had an advowson, and the eldest presented and then granted the next, in this case the grantee shall have the next which may be granted; and the reason is because she may not dispose of the estate of another."—In that case it must be taken that she did not assume to have a larger estate than as coparcener, the grant, therefore, is construed with reference to the estate which she was taken to have.

[*8 Br. P. C. 80]

A grant of "the next presentation," therefore, by a person seised in fee, that is, having all the estate therein which he can assume to have, is the same thing in intent and effect as if the grant was expressed "my next presentation."

II.—It has been *è contrà* argued, that a perpetual advowson consists of next presentations in endless succession, subject to the contingency of the King's prerogative of presenting on promotion; that a grant of the next presentation is a separation of a member of the estate from the residue subject to the same contingency, and therefore that the grant cannot extend to a presentation subsequent to that which is filled up by this prerogative of the Crown. But this reasoning is fallacious.

Allowing for a moment that the estate of the grantor is subject to the contingency, it does not follow that a grant of the next presentation is liable to be absolutely defeated by this contingency. This cannot be, unless in the event that has happened the King's right to present is taken to be the thing granted, which the defendant in error humbly submits is not the case. The effect of that reasoning is this, that the grant shall be void, in case there shall happen to be a vacancy on the King's promotion of the incumbent to a bishopric. No such condition is expressed, or can be implied, in the grant; the grant is absolute. But that which was vested in the patron is more properly the perpetual right of presentation, with the exception of those cases where the King's prerogative intervenes: which prerogative, though exercised upon the rectory, is wholly independent of the estate of the patron in the advowson, and neither forms part of it, nor operates upon it. The King's right seems to be more correctly a mere substitution of one person in the place of another, whom the King has removed, from which person so substituted a future vacancy may arise as soon as, or sooner than if the former incumbent had continued; a substitution, *putting the church in the like condition as if the King had not made the vacancy, by which vacancy the patron otherwise would be benefited, and leaving the patron probably as near his turn to present as he was before the change. All this reasoning, to shew that a grant of the next presentation is not subject to the King's prerogative, so as to be defeated by it, is confirmed in the decision of *The Grocers' Company* v. *The Archbishop of Canterbury*. If it be liable to be so defeated, those statutes for uniting particular parishes, which statutes vested the presentations to the new churches in two or more persons by turns, and which are in effect statute grants of such presentations, must have been deemed to have granted the next presentations perpetually subject to and liable to be defeated by the above contingency of the King's prerogative; the contrary of which was directly adjudged in the case last above mentioned, and in other cases there cited. It was said there by the Court, that "this does not supply, it only suspends or postpones, the turn of the patron. It postpones the turns of all the patrons, if more than one, but does not take away the right of one and leave the

[*8 Br. P. C. 81]

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rest entire, which would be rank injustice; and this being the act of law, *nemini fecit injuriam.*" Upon what principle can it be said that the same reasoning is not equally applicable here?

III.—The construction contended for on the part of the plaintiff in error would violate every rule of law directed to be applied to the construction of grants. It is contrary to that maxim which says, "that every man's grant shall be taken by construction of law most forcibly against himself;" the force of which maxim Lord Bacon says is *(inter alia)* "in deducing or qualifying the exposition of such grants as were against the law, if they were taken according to their words." It is contrary too to that rule which says that the former maxim "is so to be understood that no wrong be thereby done; for it is another maxim in law that *legis constructio non facit injuriam;*" and contrary to that which declares that "*verba ita sunt intelligenda, ut res magis valeat quam pereat.*" It insists upon a construction most favourable to the grantor, which, instead of qualifying the grant, makes it assume to do a thing contrary to law, namely, to pass the King's right, creates injustice to the grantee, and renders the grant in the event that has happened wholly inefficient; and all this in a case where the intent of the parties is manifestly conformable to that construction which would arise from the application of the above maxims of law. Those maxims would be applicable to a case even where the intent was not expressed or manifest; but here the object and intent of the grant of the next presentation to the grantee is expressed to be "to present one fit and able person to the rectory, and all other things which should be requisite to be done in and about the premises to do and accomplish as fully, freely, and entirely as the grantor or his heirs might or could do, or have done, if the grant had not been made." The latter *words, "as fully," &c. are not restrictive of the former, as has been contended; but the whole together shew a clear intent that the grantee should have that presentation to which he might by law present, and to which the grantor might have presented, if he had not made the grant, and that he should accomplish that as fully as the grantor might have done. A grant implies a covenant that the grantee may enjoy the thing granted; but a covenant cannot here be implied that he should

[*8 Br. P. C. 82]

enjoy the King's right of presentation, because that is contrary to the manifest intent, and a covenant is implied by law of that only which appears by the deed to be intended. A liberal construction was made at a time when grants were construed more rigidly than now, of a grant of a next presentation, in giving to a technical expression, having an appropriate legal import, a construction different from its usual legal import, in order to avoid a wrong; which case is shortly this: The Earl of Huntingdon being possessed of the rectory of Orton, to which the advowson of the vicarage was appendant for fifteen years, granted the next avoidance of the vicarage, "if the same should happen to be vacant, during the term of years then *in esse* of the rectory;" and his administrator afterwards, and before an avoidance, surrendered his term in the rectory, which the reversioner accepted, by which the term of years determined. The vicarage afterwards becoming void, the sole question was, if by the surrender the grant of the next avoidance was void or not? But the Court held that, notwithstanding the surrender, the grantee should have the next avoidance.—That is a case upon the same subject with the present, and in its principles and determination strong and applicable in favour of the defendant in error.

IV.—But the case of *Woodley* v. *The Bishop of Exeter* is objected as having decided that the grantee in such a case as this cannot take any other than the presentation upon the very first vacancy, and that the grant is defeated by the King's prerogative. That case, however, is distinguishable from the present. It was the case of a devise, which is gratuitous, and not the case of a grant; the devise was particularly worded, (see Winch's Entries, p. 877 in one edit. in the other p. 767,) so as to be considered by WINCH, Justice, to be "punctually expressed that the devisee should have the first," at the very time that he admits and distinguishes the case of the coparcener above put, which case, in principle, is directly in point with the present. Lord HOBART and WINCH, as the case is reported in Winch, both decide that case upon intention: but if that case could be carried further, and so as to be applied to the present, it is humbly submitted to be of no great weight. It would be a determination not only contrary to justice, and to all the rules of construction, but also

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[*8 Br. P. C. 83]

contrary to former authorities; a determination not recognised by contemporary or subsequent law writers, unsupported by and inconsistent in principle with subsequent authorities, and its validity expressly disputed, at least, by a very *late decision. Besides too, that some of its most important doctrine, with respect to the King's right of presentation, has been since overruled, it cannot be considered as having the effect, as to this point, of a determination submitted to, inasmuch as there was a fault in the declaration, by which the plaintiff could not, with success in the suit, impeach the determination in a writ of error. As to the former authorities, besides the above case of the coparcener, is the case of 15 Hen. VII. stated in Co. Litt. 379 a, determining that the grantee of the third presentation, being deprived of it by right of dower, shall have the fourth, that is, the third which the grantor could grant, having regard to the grantor's estate. This case has the confirmation of Lord Coke's opinion; for he states it to shew the diversity between the act of law and the act of the party, and to illustrate the rule that the act of law shall work no prejudice to the grantee. He considers, therefore, this case as good law, and does not exhibit the case of *Woodley* v. *The Bishop of Exeter* as trenching upon it, or upon the above rule, although he must have known of that determination, and although the first edition of that book was published in 1628, and the second edition, supposed to have been revised by him, in 1629, both of them soon after that determination. Chief Justice TREBY, in his notes on Dyer, p. 35, states the case of dower, as allowed by Chief Justice HOBART and by HUTTON, Justice, to be as above stated; and the case of a grant of the next presentation, and of avoidance by promotion to a bishopric, as determined in favour of the grantee. This latter point he also states in his notes in Dyer, 228 b, as having been so decided.—Whether the case or cases there mentioned be the case of *Woodley* v. *The Bishop of Exeter*, or not, it seems that TREBY, Chief Justice, as well as Lord Coke, did not conceive that case, which was the case of a particular devise, as extending to the case of a grant of the next presentation, or deciding that the law would in the case of such grant defeat the grantee, but as deciding or allowing the contrary; he states also the reason to be, that the act of law and

the King's prerogative shall prejudice no man. It is observable too, that the case, though decided by Lord HOBART, is not reported by him. The decisions since upon the statutes for uniting particular parishes, and granting the presentations of the new churches to the patrons of the old churches by turns, are contrary in principle to the decision of *Woodley* v. *The Bishop of Exeter*, as reported in Winch and Cro. Jac. if that determination be considered as extending to the case of a grant, or beyond the question on the intention of the testator manifested by the particular wording of that devise.

V.—Therefore, upon all the rules of construction, upon the maxims that the act of law, or the King's prerogative, shall prejudice no man, upon the authority of decided cases, as well prior as subsequent, upon the manifest and expressed intent and object of the parties to the grant in question, and upon the *principles of justice, the defendant in error humbly submits that [*8 Br. P. C. 84] this grant must be construed so as not to be defeated by the King's prerogative. The strict literal construction contended for on the part of the plaintiff in error, without regard to the subject matter of the grant, and the nature of the King's right to present by his prerogative, cannot, it is humbly submitted, be allowed, without violating the above rules, maxims, authorities, intent and principles. The only case, too, that can be attempted to be cited to support that strict construction, it is humbly submitted, is clearly distinguishable from the present, and, as far as it is said to apply to this case, is a determination in contradiction to the decided law as it then stood; a determination never since allowed, or recognized to be law; contrary to the law in similar cases as since determined, and contrary to what was understood at that time by Lord Chief Justice COKE, and since by Lord Chief Justice TREBY, to have been the law. The defendant in error therefore humbly hopes that the judgments of the Courts of Common Pleas and King's Bench will for these and other reasons be affirmed.

After hearing counsel in this writ of error, the counsel were directed to withdraw—and the following question was put to the judges:

Whether the grant to Matthew Kenrick set forth on the record is defeated by the vacancy which has happened by promotion since the grant, which has been filled by the King's prerogative?

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Whereupon, the LORD CHIEF JUSTICE of the Court of Exchequer delivered the unanimous opinion of the Judges present upon the said question in the negative.

Then, ordered and adjudged, that the judgment given in the Court of King's Bench, affirming a judgment of the Court of Common Pleas, be

Affirmed—and that the cause be remitted.

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July 9.

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KEWLEY AND ANOTHER *v.* RYAN.

(2 H. Bl. 343—348.)

HENCHMAN *v.* OFFLEY.

(2 H. Bl. 345—346 n.)

A policy of insurance on goods "by a ship or ships as interest shall appear" is legal; and the insurer under such a policy will be bound by an appropriation of the insurance to a particular ship made by the assured alone (provided he does so in good faith and consistently with his original intention in making the policy).

An intention to deviate from a voyage once begun has no effect until something is voluntarily done in pursuance of that intention, whereby the risk is actually changed.

THIS was an action on a policy of insurance, and the material facts of the case were as follow:—On the 24th of May, 1793, Freeland & Rigby, merchants at St. Vincent, wrote* to the plaintiffs, merchants at Liverpool, who were also partners in a house of the same name at Grenada, requesting them to get 1,260*l.* insured on 70 bales of cotton shipped on board the *Elizabeth*, from Grenada to England, and also 1,300*l.* on another

* The following was the letter:—

"24th May, 1793.

"Messrs. JOHN and PATRICK KEWLEY.

"DEAR SIRS,—By a letter received this morning from your Mr. Wm. Kewley, I find he has shipped on board your *Elizabeth* seventy bales of cotton belonging to your house, and addressed it to you, on which I request you will get insured 1,260*l.* sterling, valuing it at 18*l.* per bale.

"I am, &c., "THOMAS RIGBY."

"P.S. Upon considering our affairs I have determined to return our boat immediately to Grenada with another load of cotton, and have it shipped to your address by some vessel that will sail with the first convoy, therefore be pleased to make insurance for 1,300*l.* sterling on our accounts by ship or ships at 18*l.* per bale at and from Grenada to England. The Government sloop is just arrived from the fleet, and brings account that the convoy will be appointed to sail the first week in June."

cargo of cotton and other goods, which they intended to ship on board some other ship that should sail with the first convoy, and therefore directing the latter insurance to be "on ship or ships." The plaintiffs accordingly by their broker insured 1,260*l.* on board the *Elizabeth* in London, and 1,300*l.* on board "ship or ships," viz. 700*l.* at Liverpool, and 600*l.* in London. The policy for 700*l.* of which the defendant underwrote 50*l.*, and on which the action was brought, was at and from Grenada to Liverpool, on any kind of goods as interest should appear, in ship or ships on account of Freeland & Rigby, warranted to sail on or before the 1st of August, 1793, and to return 3 per cent. if the ship sailed with convoy bound to Great Britain, and arrived, &c. without any exception of the goods on board the *Elizabeth.* The policy for 600*l.* effected in London, was also "on ship or ships" at and from Grenada to Liverpool, but with an exception to 1,260*l.* "on 70 bales of cotton per *Elizabeth Crettin,*" the same underwriters in London having before subscribed the policy on the *Elizabeth.* But the plaintiffs did not communicate to the underwriters at Liverpool, the letter of Freeland & Rigby directing [344] an insurance on the *Elizabeth*, nor any circumstances respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.

The *Elizabeth* sailed early in June, and arrived safely at Liverpool, in August, 1793. The *Heart of Oak*,* on board of which Freeland & Rigby had shipped their second cargo of cotton, &c. sailed the latter end of July, bound for Liverpool, but with a design formed before the commencement of the voyage (as appeared by the clearances, and was admitted on all sides) to touch at Cork in her way to Liverpool, but was totally lost before she arrived at the deviating point.

The defendant pleaded the general issue, and a tender of 1*l.* 10*s.* on account of the safe arrival of the *Elizabeth*, which the plaintiff took out of Court, and obtained a verdict for 48*l.* 10*s.*

A rule having been granted to shew cause why there should not be a new trial, *Adair* and *Heywood*, Serjts. shewed cause:

* It did not appear that the plaintiffs when they entered the insurance in question, knew on board what ship Freeland and Rigby had shipped this cargo.

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Considerable doubts having been thrown out at the trial, whether such a policy as this on ship or ships were a good one, the validity of it is first to be considered. Now policies of this kind are well known to foreign nations, Emerigon, 173, tit. Assurance *in quovis*, and are constantly used in the West India trade by us in time of war, when it is uncertain by what ships the produce of the different islands may be sent to Europe; and they are also supported by authorities, *Tierney* v. *Etherington*, cited 1 Burr. 348; *Dick* v. *Barrell*, 2 Str. 1248; Parke, 19. There are, therefore, only two questions; 1. Whether the policy on ship or ships was discharged by the safe arrival of the *Elizabeth*, or in other words, whether the insured had a right to apply the insurance to the *Heart of Oak* that was lost? 2. Whether the voyage insured being from Grenada to Liverpool, the policy was rendered void by an intention to touch at Cork in the way to Liverpool, the ultimate port of delivery, that intention not having been carried into effect? 1. The plaintiffs had clearly a right to apply the insurance to the ship that was lost. The insurances were totally distinct, and so were the risks, and the one is in no degree applicable to the other. If the *Elizabeth* had been lost, the defendant would clearly not have been liable, there being a separate insurance on that ship, but the benefit [345] and loss must be reciprocal, and if he would not have been answerable in case of the loss, he cannot be benefited by the safety of the *Elizabeth*.

Mr. Justice BULLER, in this part of the argument, cited the case of *Henchman* v. *Offley*,* in confirmation of the doctrine that the insured had a right to appropriate: and also intimated a decided opinion, that the mere intention to put into Cork in the course of the voyage to Liverpool, did not vitiate the policy.

But supposing the *Elizabeth* to be one of the ships on which the policy in question might attach, still the plaintiff is entitled to keep his verdict, for he had a right to appropriate; and then the different insurances might be brought into average, 1 Emerigon, 174. There is nothing in the law of England which says, that the first arrival shall discharge the underwriter. 2. The

* Page 413, *post*.

policy was not avoided by a simple intention to touch at Cork, in the course of the voyage to Liverpool, which was the port of delivery. The ship originally sailed on the voyage insured, and an intention to deviate not carried into effect, does not vitiate the policy. *Foster* v. *Wilmer*, 2 Stra. 1249; *Carter* v. *The Exchange Assurance Company*, ibid.; *Thelusson* v. *Ferguson*, Dougl. 361. It is true, that in *Wooldridge* v. *Boydell*, Dougl. 6, the policy was holden to be void, but that case was essentially different from the present: there the voyage insured was "at and from Maryland to Cadiz," but the ship was in fact bound to Falmouth, and there was no intention of going to Cadiz at all; here Liverpool was the place of final destination, to which the ship would have really proceeded. The true criterion to determine whether a voyage on which a ship sets out is the same as that insured, is to discover whether she is in fact bound to her ostensible port of delivery; if that be the case, an intention to go out of the track, not carried into execution, does not alter the nature of the voyage.

Le Blanc, Serjt. *contrà:*

The ground on which it is to be contended that the policy was satisfied, is, that a ship answering the description in it arrived in safety, having the full amount of the sum insured on board. Every circumstance respecting the specific insurance on the *Elizabeth* having been concealed from the defendant, it was the same with regard to him, as if no such insurance had been made on that ship. If, therefore, the *Elizabeth* had been lost, and the *Heart of Oak* had arrived in safety, the plaintiffs had it in their power, by suppressing the letter of the 24th of May, to have charged the defendant on that loss. In common justice, therefore, the underwriter ought to be benefited by the safety of the same ship, for the loss of which, if it had happened, he would have been liable to pay. The plaintiff, too, by concealing the particular insurance on the *Elizabeth*, acted without the good faith required [347] in mercantile transactions, and contrary to the directions expressed in the ordinances of other nations, for the purpose of preventing frauds, Weskett, 520. They shall not, therefore, be permitted to avail themselves of their own wrong.

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As to the case of *Tierney* v. *Etherington*, that was not a case of a general insurance, for it was specified in the policy, that the goods were to be on board a British ship or ships: so in *Dick* v. *Barrett*, the insurance was equally certain, being on any ship in which the plaintiff should come from Virginia to London, which was the same in effect as if the ship itself had been specified. Those cases, therefore, are not applicable to that of a general insurance like the present. The only case where the policy was similar, is, *Henchman* v. *Offley*, and there it does not appear that the validity of the policy came in question: there also the appropriation was not made till after the insurance, but here it was made before.

The next question is, whether the voyage insured was not a different one from that on which the ship set out; for though a mere intention to deviate, not carried into effect, will not vitiate the policy provided the voyage be the same, yet if the voyage be different, the policy is clearly void, according to the doctrine laid down in *Wooldridge* v. *Boydell*, Dougl. 6, and *Way* v. *Modigliani*, 2 Term Rep. B. R. 30. Now it cannot be fairly said, that a voyage from Grenada to Liverpool, and from Grenada to Cork and Liverpool, are one and the same. So clear indeed was Lord KENYON on this point, that at Guildhall* the plaintiff was nonsuited in an action on a policy of insurance on this very ship the *Heart of Oak*, on the ground that it was not the voyage insured, and that there had been no inception of that voyage.

Cur. advis. vult.

On this day, the Court, consisting of the LORD CHIEF JUSTICE,† Mr. J. HEATH, Mr. J. ROOKE, declared their opinion as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established both by usage and authority to be disputed; as to the second, that the insured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it, for which [348] the case of *Henchman* v. *Offley* was an authority; as to the third,

* *Stott* v. *Vaughan*, sittings after Hilary Term, 34 Geo. III.

† Mr. Justice Buller was absent, but it was stated by the Lord Chief Justice that he fully concurred with the rest of the Court.

that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge* v. *Boydell* it appeared there was no intention that the ship should go to Cadiz at all, which was mentioned in the policy as her port of delivery, and in *Way* v. *Modigliani* there was an actual deviation by the ship going to fish on the banks of Newfoundland; those cases therefore were wholly different from the present, for here the ship was really bound to Liverpool, though there were also clearances for Cork. The remaining question therefore was, whether the letter of the 24th of May, by which Freeland & Rigby directed an insurance to be made on the *Elizabeth*, and the actual circumstances of that insurance ought to have been communicated to the underwriters on the present policy? But as nothing was necessary to be disclosed but what was material to the risk run, and as the insurance on the *Elizabeth* was not material to that risk, the concealment was not fraudulent, and therefore could not affect the right of the plaintiffs to recover.

Rule discharged.

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B. R. MICH. 23 GEO. III.
(2 H. Bl. 345—346 n.)

THIS was an action on a policy of insurance of 6,000*l.* on goods, to come in ship or ships from Bengal to London; and the facts of the case were the following: the plaintiff in India wrote to his correspondent in England, to get two insurances, one of 6,000*l.* on goods on board any ship or ships which should sail between the first of November, 1779, and the first of July, 1780, and the other of 4,000*l.* on goods on board any ship or ships, which should sail between the first of February, and the thirty-first of December, 1780. The two insurances were accordingly effected, and the plaintiff loaded goods to the amount of 4,889*l.* on board the ship *General Barker*, and 4,500*l.* on board the ship *Ganges*, and at the time of the loading entered a certificate before Sir Elijah Impey, the Chief Justice, that he had put such goods on board

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the one ship, and such on board the other, and that he had shipped on board the *General Barker* 4,889*l.* of the risk intended to be covered by the 6,000*l.* policy. Both ships sailed within the time mentioned in the first policy; the *General Barker* was lost, but the *Ganges* arrived safe at the place of her destination: and this action was brought on the policy for 6,000*l.* which the plaintiff contended he had a right to apply to the *General Barker*, and went for a total loss. At the trial, two objections were made: 1st, that evidence could not be given of what passed in the East Indies: 2nd, that there ought to be a contribution, all the underwriters called upon as for an average loss, and both policies taken into the account, and that the plaintiff ought only to recover in the proportion of 4,889*l.* to 4,500*l.* or at most as 4,889*l.* was to 1,111*l.*

Lord MANSFIELD over-ruled the objection as to the evidence, and was of opinion, that the plaintiff might apply the 6,000*l.* policy entirely to the *General Barker;* and a verdict was found accordingly. But a new trial was moved for, and a rule granted to shew cause.

In support of the rule, *Lee*, *Cowper*, and *Pigot* contended, that all the underwriters were liable for losses on both ships; that if the *Ganges* had been lost, the defendant would have been called upon, and therefore, that as he would have in that case been liable for the loss, he was in justice intitled to the benefit of salvage. There was no appropriation of any particular ship or goods, and this is an attempt to appropriate after a loss. At the time when the policy was underwritten, it was not communicated to the underwriters, that so much was shipped on board the *General Barker*, and so much on board the *Ganges*, and they shall not be affected by a declaration afterwards made without their privity. The contract must be explained according to the situation in which things stood between the parties, at the time when it was made. The plaintiffs shipped 4,889*l.* on board the *General Barker*, and 1,100*l.* on board the *Ganges*, and this at a time when he did not know that the premiums and expense of insurance would make up the exact sum of 6,000*l.*

1783.

HENCHMAN v. OFFLEY.

Wallace, contrà:

The material question is, whether the 4,500*l.* on board the *Ganges*, shall be taken into the account of the loss of the *General Barker*. The owner in India meaning to ship 6,000*l.* property sends to insure it. The meaning of this policy is, that he may load goods to that amount, on board any ship or ships. As he had not the policies, he could not make any indorsement on them, but he not only writes to his correspondent here, but makes a solemn oath before the chief magistrate in India, of the manner in which he shipped the goods, and of the apportionment. Suppose he had said he put all covered by the 6,000*l.* policy, on board the *General Barker*, the underwriter could not have objected. This was an appropriation made before any loss had happened, or the ships had sailed, which the insured had clearly a right to make.

The COURT discharged the rule, but ordered the salvage on the 1,111*l.* to be deducted out of the damages recovered, which made a deduction of about one-fifth.

C. P. MICHAELMAS TERM.

PAYNE *v.* ROGERS.

(2 H. Bl. 350—351.)

1794. *Nov.* 15.

[350]

If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair.*

LE BLANC, Serjt. moved for a rule to shew cause why the verdict found for the plaintiff in this cause should not be set aside, and a nonsuit entered. It was an action on the case

* Approved by judgment of the Court in *Todd* v. *Flight* (1860) 9 C. B. N. S. 377, 30 L. J. C. P. 21; and cited in the judgment of *Nelson* v. *Liverpool Brewery Company* (1877) 2 C. P. D. 311, 46 L. J. C. P. 675, where the landlord not having contracted to repair, nor having been guilty of misfeasance, was held not liable.—R. C.

See also *Pretty* v. *Bickmore* (1873) L. R. 8 C. P. 401; *Gwinnell* v. *Eamer* (1875) L. R. 10 C. P. 658; *Sandford* v. *Clarke* (1888) 21 Q. B. D. 398, 57 L. J. Q. B. 507.—F. P.

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against the defendant as owner of a house in the occupation of one Platt his tenant, for an injury sustained by the plaintiff by his leg slipping through a hole in the foot pavement, into a vault or cellar, owing to some plates or bars, which went under the pavement, being out of repair. And the ground of the motion was, that the action ought to have been brought against the actual occupier of the house, whose more immediate business it was to know what repairs were necessary, and to see that they were made, and not against the landlord. Though the landlord might bear the expense of the repairs, yet, as between the occupier and the public, the occupier was bound to look to the state of them, and ought to be liable for any accident that might happen by his neglect. Thus in *Cheetham* v. *Hampson*, 4 Term Rep. B. R. 318,* it was holden that an action on the case for not repairing fences could only be maintained against the occupier.

BULLER, J.:

Who was to repair in the first instance?

LORD CH. J.:

Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *primâ facie* bound to repair, and therefore liable, yet if he could shew that the landlord was to repair, then that the landlord was liable.

BULLER, J.:

The direction of my Lord Chief Justice was most clearly right. I agree that the tenant as occupier is *primâ facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can shew that the landlord is to repair, the landlord is liable for neglect to repair.

HEATH, J.:

If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord.

ROOKE, J. of the same opinion.

Rule refused.

* 2 R. R. 397.

PROCTOR *v.* THE BISHOP OF BATH AND WELLS, THOMAS MOORE AN INFANT, AND RICHARD GOLDSBOROUGH AND EDWARD MOORE, HIS GUARDIANS.

1794. *Nov.* 26.

[358]

(2 H. Bl. 358—362.)

A. devises an advowson to the first or other son of B. that should be bred a clergyman, and be in holy orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; therefore though B. dies without having had a son, the heir at law of the devisor, and not C., is entitled.*

QUARE IMPEDIT, brought to recover the presentation to the church of the rectory of West Coker in Somersetshire.

[Mary Proctor being seised of the share of the advowson in respect of which the right of presentation arose, made her last will and testament, and gave and devised unto the first or other son of her grandson, Thomas Proctor, that should be bred a clergyman and be in holy orders, and to his heirs and assigns, all her right of presentation to the said rectory, &c. But in case her said grandson Thomas Proctor should have no such son, then she gave and devised the said right of presentation unto her grandson Thomas Moore, his heirs and assigns for ever. Mary Proctor died so seised, leaving the said Thomas Proctor and Thomas Moore her surviving. Afterward Thomas Proctor died without having ever had any son, and leaving Thomas Moore still surviving. The question was whether Thomas Moore became entitled under the devise.

The question having been twice argued:]

The COURT † were very clearly of opinion, that the first devise [362] to the son of Thomas Proctor was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided, as was the case in *Longhead* v.

* *Vide Cambridge* v. *Rous*, 8 Ves. 12, 24; *Beard* v. *Wescott*, 5 Taunt. 412; 5 B. & A. 801; and see Mr. Butler's note, Fearne, Cont. Rem. 508 (*k*).

† Absent Mr. Justice Buller.

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Phelps, 2 Black. 704; and there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham* v. *Tothill*, 6 Brown, P. C. 471, in which the judges founded their opinion on *Butterfield* v. *Butterfield*, 1 Vesey 134. Consequently the heir at law of the testatrix was entitled.

Judgment for the plaintiff.

1794. *Nov.* 27

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MELLISH AND ANOTHER *v.* SIMEON.

(2 H. Bl. 378—379.)

A. in England draws a bill of exchange on B. in a foreign country, which, after having been negotiated through another foreign country is presented to B., who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment. The drawer is liable for the whole amount of the re-exchange between the different countries.

ON the 9th of July, 1793, two bills of exchange were drawn by Simeon in London, on Boyd & Co. in Paris, one for 35,000, the other for 36,000 livres Tournois, amounting together to 603*l.* 19*s.* 10*d.* sterling, according to the rate of exchange between London and Paris, of 6⅛*d.* for the French crown of three livres, and payable to the order of Mellish & Co. who indorsed them in London to Jeysset & Co. at Amsterdam. Jeysset & Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd & Co. refused to accept them, but promised that they should be paid when they became due.

In the mean time the French Convention passed a decree prohibiting the payment of any bills drawn in any of the countries at war with France, and of course the bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment, and at the same time Androine drew another bill on Meryolet for the amount of them at the rate of 18½ groots for the French crown of three livres, for the re-exchange between Paris and Amsterdam, together with the ordinary charges, which bill Meryolet paid, and was reimbursed by Jeysset & Co. by

compromise between them, at the rate of 18 groots for the French crown, amounting to 905*l.* 13*s.* 9*d.* sterling, for which sum, together with charges at Amsterdam, and the re-exchange between that place and London, making in the whole 913*l.* 4*s.* 3*d.* sterling, Jeysset & Co. drew a bill on Mellish & Co. which they paid, and took back the former bills, on which they brought the present action against Simeon the drawer, and recovered a verdict for the whole sum of 913*l.* 4*s.* 3*d.* And now *Le Blanc*, Serjt., moved for a new trial, on the ground that the defendant was not liable for the loss on the re-exchange. It is true, he said, that the drawer of a bill of exchange undertakes by the act of drawing it that the drawee shall be found in the place where he is described to be, and shall have effects in his hands, but the undertaking does not extend to the case of a prohibition to accept or pay the bill, imposed by the law of a foreign country in which the drawee resides. When a person takes a bill, circumstanced as this was, he must submit to the laws of [379] that country. There was no default in the drawer; he therefore cannot in justice be liable for more than the sum he originally received for the bills, with interest, and the expenses of protesting them.

LORD CHIEF JUSTICE EYRE:

I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be a part of the damages arising from the contract not being performed. I thought indeed at the trial, that it might be a question whether the drawer were liable for the re-exchange occasioned by the circuitous mode of returning the bills through Amsterdam, but the jury decided it.

BULLER, J.:

What is the engagement of the drawer of a bill of exchange? He undertakes that the bill shall be paid when due. If it be not paid, it is not necessary for the holder to inquire for what reason it is not paid, and if the holder has been guilty of no default, the drawer is answerable for the amount of the bill;

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and if he is liable for the bill, he must also be liable for the re-exchange, which is a consequence of the bill not being paid.

HEATH, J. of the same opinion:

He who undertakes for the act of another, undertakes that it shall be done at all events.

ROOKE, J. of the same opinion.

Rule refused.

C. P. HILARY TERM.

1795. *Feb.* 4.

[386]

CULLEY *v.* SPEARMAN.

(2 H. Bl. 386—389.)

One tenant in common cannot avow alone for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion.†

REPLEVIN for taking cattle. Avowry, that John Addison was seised in fee of seven undivided eighth parts of the *locus in quo*, and demised the said seven undivided eighth parts to the defendant, who took the cattle damage-feasant, &c.

To which there was a special demurrer, shewing for causes, "That the defendant hath not set forth or disclosed in or by that avowry, who is seised in fee of the other undivided eighth part of the said place, in which, &c. nor shewn nor deduced any title to the same, nor hath avowed under any title deduced to himself of that eighth part of the said place, in which, &c. nor made cognizance under any person seised or possessed of such eighth part as tenant in common with himself as he ought to have done, and for that, he hath avowed the said taking of the said cattle in his own right only, whereas he ought also to have made cognizance as bailiff of *the person or persons seised or possessed of the said other undivided eighth part of the said place, in which, &c."

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† But in an avowry for rent, which is a demand in the realty, tenants in common must avow for their separate portions, *Harrison* v. *Barnby*, 5 T. R. 249; 2 R. R. 584.

Le Blanc, Serjt. in support of the demurrer:

It is a clear rule of law, that tenants in common must all join in actions concerning the personalty. Co. Lit. 198 a. Now an avowry stating that the cattle were taken damage-feasant, is in the nature of a declaration in trespass for the injury done, and within the principle of the rule: the avowant is *quasi* plaintiff, and is entitled to damages, if the verdict be in his favour. There may be several avowries for rent, because that is in the realty, but not for damage-feasance, which is in the personalty. In 1 Roll. Abr. 220, pl. 14, it is said, that a tenant in common cannot avow the taking of cattle damage-feasant without making himself bailiff or servant of his companion, and the same point is laid down, Sir W. Jones, 253; Thel. Dig. 27.

Clayton, Serjt. *contrà*:

The case in Sir W. Jones is the same as is stated in 1 Roll. Abr. 220, viz. *Lamshead* v. *Leate*, and is also to be found in 3 Vin. Abr. 388. But it is directly contradicted by that of *Willis* v. *Fletcher*, Cro. Eliz. 530. It by no means follows, that tenants in common must join in an avowry for an injury to the land, because they must do so in a personal action. They are several in every point except in their possession, and are like commoners who, though they have an unity of possession, may yet make several avowries for an injury to the common. 1 Roll. Abr. 405, pl. 5; 9 Co. 112 b; Yelv. 129; 4 Burr. 2426. Tenants in common must make separate demises in ejectment, Show. 342; *Moore* v. *Fursden*, 2 Wils. 232; *Heatherley* v. *Weston*. So because the freehold is several, one may enfeoff, but cannot release to the other, whereas, where the freehold is joint as between joint-tenants, one may release to, but cannot enfeoff the other, Co. Lit. 200 b. It is not a necessary consequence, that because they must join in an action, they must do the same in an avowry. If they lease their tenements to another, they must join in an action of debt for the rent, but must make several avowries for it, Co. Lit. 198 b. In *Ward* v. *Everard*, Carth. 340; 1 Salk. 389; 1 Lord Raym. 422, it was admitted, that tenants in common, grantees of a rent charge, could not be joined in a cognizance for the rent; it is objected, that one

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ought to shew himself bailiff to the other. But whether bailiff or not is traversable, Bull. N. P. 55; and suppose one should be hostile to the other, conspire with the owner *of the cattle, and not consent to his companion being his bailiff, the other could not prove himself bailiff, and then what remedy could he have, if he could not avow alone?

BULLER, J.: †

My brother *Clayton* has made more of his part of the argument than I thought could have been made of it: but the authorities on the other side are too strong to be got over. Of the two contradictory cases, the one in Cro. Eliz. and the other in Sir W. Jones, there cannot be a doubt which ought to prevail. That in Cro. Eliz. was decided quite on a different point: but there, the two judges, who were of contrary opinions to WALMSLEY, held expressly, that an avowry was in the nature of an action. If so, there is an end of the question, for it is admitted that in an action of trespass and other actions which concern the personalty, all the tenants in common must join. In the case cited by my brother *Le Blanc* in Sir W. Jones, all the Court held, that they must join in an avowry for damage-feasant, and as that was the very point on which it turned, and as it is of a much later date than the case in Cro. Eliz. we must be bound by it. But independent of authorities, let us see how my brother *Clayton's* reasoning will bear him out: he says, the interests of tenants in common are several in every respect, except what regards their possession; but by that, he admits the whole argument on the other side; this case arises from an injury to the possession, and the taking cattle damage-feasant is taking a pledge for satisfaction for that injury. Then he compares this to the case of commoners who may bring several actions for disturbing their right of common, but that instance is not applicable to the present case. Commoners have not one estate, but each has a different estate within the manor; and the property of the waste, on which they have common, is in the lord. An injury therefore to their several rights of common, is totally different from an injury to the land, in which

† Absent the Lord Chief Justice.

tenants in common have but one estate. As to the supposed hardship, if two tenants in common were hostile to each other, and the one were obliged to avow as bailiff of the other, without obtaining the other's consent that it is incident to the nature of the estate; if he dislikes his situation, he may put an end to the tenancy by a writ of partition. With respect to the case of *Ward* v. *Everard*, there the rent was expressly granted to be paid in several portions to the grantees who had several titles, *and each a power of distress reserved in the deed. That case, [*389] therefore, does not contradict the rule, that in an avowry concerning the personalty, all the tenants in common must join.

HEATH, J. of the same opinion:

It is a matter of necessity, and for the sake of justice, that both the tenants in common should join, for if one were to distrain without the other, as there could not be a double satisfaction for the same injury, the other would have no remedy.

ROOKE, J. of the same opinion:

I think the authority of the case cited from Sir W. Jones outweighs that in Cro. Eliz. Tenants in common have been improperly, in the argument, compared to commoners, who are so called, not from any community of interest between themselves, but because they have a right to pasture on the waste in common with the lord.

Judgment for the plaintiff.

But leave was given to amend.

TERRY AND ANOTHER *v.* DUNTZE, BART.

(2 H. Bl. 389—393.)

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A. covenants to build a house for B. and finish it on or before a certain day, in consideration of a sum of money, which B. covenants to pay A. by instalments as the building shall proceed. The finishing the house is not a condition precedent to the paying the money, but the covenants are independent. A. therefore may maintain an action of debt against B. for the whole sum, though the building be not finished at the time appointed.

[THIS was an action of debt, for money claimed as due under a building contract, the terms whereof, so far as material, sufficiently appear from the judgment.]

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*There were also counts for work and labour, money paid, and on an account stated.

To the first count there was a general demurrer, and to the others *nil debet* was pleaded.

In support of the demurrer, *Le Blanc*, Serjt., argued, that as the plaintiffs had positively agreed to complete the buildings on or before the 29th of September, it was necessary to shew that they were completed on or before that day. * * *

The counsel on the other side was stopped by

BULLER, J.: †

The only question in this case is whether the covenants were dependent, and whether the completing the buildings was a precedent condition. Now it is a rule long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. It is accordingly laid down by Lord HOLT in *Thorpe* v. *Thorpe*,‡ that "if a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done: for it appears the party relied upon his remedy; and intended not to make the performance a condition precedent;" and he cites the Year Book, 48 Ed. III. 2, 3; 7 Co. 10 b; *Ughtred's* case, 1 Ventr. 147; and 1 Sand. 319. The case in the Year Book, 48 Ed. III. 2, 3, is inaccurately stated by Lord Coke in *Ughtred's* case to be "that Sir Ralph Tolcelser covenanted with Sir Richard Pool to serve him with three esquires of arms in the war with France, and Sir Richard covenanted [393] therefore to pay him forty-two marks, and that each party had equal remedy, one for the service, and the other for the money." But it appears in the Year Book, that the covenant was that half the money was to be paid in England before they went to France: the principle therefore of that case agrees with the doctrine of Lord HOLT in *Thorpe* v. *Thorpe*, as is observed by him 12 Mod. 461. So also in *Pordage* v. *Cole*, 1 Saund. 319,

† Absent the Lord Chief Justice.

‡ 1 Salk. 170; 1 Ld. Raym. 662; Comyn's Rep. 98; and more at length 12 Mod. 455.

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where there was an agreement by the defendant to give a certain sum to the plaintiff for his lands and house, &c. to be paid at a fixed period, and only five shillings of the purchase-money was advanced at the time of making the agreement, an action on the agreement was holden to lie for the residue amounting to 774*l.* 15*s.* without showing that he had either made or tendered a conveyance of the lands. Now let us apply this principle to the present case. The plaintiffs covenant to finish and complete the buildings on or before the 29th of September then next; in consideration of which the defendant covenants to pay 3,800*l.* by instalments, viz. a certain sum when the second floor should be laid, a further sum when the fourth floor should be laid, and the remainder of the money when the whole should be covered in and finished. By the terms of the contract then two several sums of money were to be paid, before the thing to be done was done. The plaintiffs therefore were clearly entitled to their action for the money without averring performance, and the defendant to his remedy on the covenants.

HEATH, J. of the same opinion.

ROOKE, J. of the same opinion.

Judgment for the plaintiff.

FITCH *v.* RAWLING, FITCH AND CHATTERIS.*

(2 H. Bl. 393—399)

1795. *Feb.* 4.

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A custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A. at all seasonable times of the year, at their free will and pleasure," is good. But a similar custom, "for all persons for the time being, being in the said parish," is bad.

THIS was an action of trespass for breaking and entering the plaintiff's close at Steeple Bumstead in Essex, and playing there,

* Cited in the judgment of Mr. Justice WILLES on the question referred by the House of Lords in *Mayor &c. of London* v. *Cox* (1867) L. R. 2 H. L. 239, 274, 36 L. J. Ex. 225; also in the judgment of Lord ROMILLY, M. R. in *Warwick* v. *Queen's Coll. Oxford* (1870) L. R. 10 Eq. 105, 129; also by KAY, J., in *Bourke* v. *Davis* (1889) 44 Ch. D. 110, 120. Followed by the Divisional Court in *Hall* v. *Nottingham* (1873) 1 Ex. D. 1, 45 L. J. Ex. 50.—R. C.

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with divers other persons to the plaintiff unknown, at a certain game called cricket, and other games, sports and pastimes, and in so doing, &c.

Pleas. 1st. Not guilty by all the defendants. 2nd. By Chatteris, "That there now is and from time whereof, &c. hath been a certain antient and laudable custom used and approved of [*394] in *the said parish, that is to say, that all the inhabitants for the time being of the parish aforesaid, have during all the time aforesaid, used and been accustomed to have, and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the said close in which, &c. every year, at all seasonable times of the year at their free will and pleasure;" he then averred, that at the several times when, &c. he was an inhabitant of the said parish, and at those times, being seasonable times, he entered the *locus in quo*, and played at cricket, &c. The third plea, by Rawling and Fitch, stated the custom to be for "all persons for the time being, being in the said parish, to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the *locus in quo* at all seasonable times, &c." and justified under that custom.

The replication to each plea traversed the customs alleged, and on the traverses issues were joined, and a verdict found for the defendants. And now *Le Blanc*, Serjt., showed cause against a rule to arrest judgment.† There is no good objection to the customs stated on this record, and therefore no ground for arresting the judgment. It is laid down in *Gateward's* case, 6 Co. 59 b, that though a custom for the inhabitants of a place, as such, to take an interest or profit in the soil of another is bad, yet a custom for them to have an easement in another's soil is good. In *Abbot* v. *Weekly*, 1 Lev. 176, a custom for the inhabitants of the vill to dance in the plaintiff's close for their recreation, was holden to be a good one. Here the case is

† When the rule was moved for, Mr. Justice BULLER observed that as there was a verdict for the defendants on the whole record, it was useless to move in arrest of judgment, for as it appeared that they had not committed the trespasses complained of, it was immaterial what became of the special issues. The *postea* therefore was amended by entering a verdict for the plaintiff on the general issue, and for the defendants on the others.

stronger than that of *Abbot* v. *Weekly*, the custom being alleged to be, to play at lawful games and sports at all seasonable times. As to the custom in the second plea, there is no material difference between the inhabitants and persons being in the parish. The claim of both is merely for an easement, and there seems to be no more ground to object to all persons being in the parish enjoying the easement, than to all the King's subjects passing over a highway, in the soil of another.

Bond and *Heywood*, Serjts. in favour of the rule: [395]

Neither of the customs stated on this record can be supported. With respect to the first, * * there is great uncertainty in the description of inhabitants; it includes all servants, visitors, women and children: it depends neither on time nor estate: their interest is transitory, and not in general noticed by the law. * * A grant to all the inhabitants of a place would be bad for its uncertainty. They cannot claim a profit *à prendre* in the soil of another, but are restrained to matters of discharge in their own, as from toll, 3 Mod. 290, *Pain* v. *Patrick;* from tithes, Cro. Jac. 152; or to matters of easement in that of another. The matters of easement which they may claim, are to be classed under two heads, such as are necessary for the enjoyment of their own estates, and such as are for the public good. * * The custom stated in the second plea, if it can be supported, falls within the latter class. But in order to make it good, it ought to have shown that the games were for the recreation and health of the inhabitants, and that Chatteris played for his recreation, on which ground the custom in *Abbot* v. *Weekly* was holden to be good; it is not sufficient that they were merely for pleasure. [This plea is also bad, since it appears on the record, that the defendant Chatteris played with the other defendants who were not inhabitants, and with other persons. To them the justification cannot be applied:] they [396] were trespassers, but what they did together was one act, 2 Roll. Rep. 224, *Storey* v. *Rice;* and if they were trespassers he was one too, for he aided and assisted them. If he be supposed to have been there by licence of law, he became a trespasser *ab initio*, by abusing that licence.

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With respect to the third plea, the custom there stated is also bad, it being for all persons being in the parish, that is for all persons in the world, who may choose to come into the parish. This is void for its generality. * * *

But be these customs good or bad, the plaintiff is entitled to judgment, or at least there must be a *venire de novo*. On the same record the jury have found that two contradictory customs exist in the same place. * * *

[397] *Le Blanc*, Serjt. who was going to reply, was prevented by the Court.

BULLER, J.:*

Some nice and critical objections have been made to the pleadings in this case, which I shall first consider. It is said that the plea of the defendant Chatteris does not answer the complaint laid in the declaration, which is, that all the defendants together with divers other persons unknown to the plaintiff, played at cricket in the plaintiff's close, but that the plea alleges the custom to be for the inhabitants of the parish to play at cricket there, and that Chatteris as an inhabitant so played; that is, says my brother, *Heywood*, that he played there with other persons who were not inhabitants, and who were therefore trespassers, and that he himself by aiding them in their trespass, was guilty of an abuse of a licence in law, and therefore a trespasser *ab initio*. But this objection, supposing it to be a good one, does not arise on the face of the plea, and if the plaintiff would have availed himself of it, he ought to have set it out by way of replication. It cannot prevail on a motion in arrest of judgment, for admitting it to have more weight than I think it has, after verdict, it is cured by the statutes of Jeofails.

Another objection made is, that the customs, whether good or bad, are repugnant to each other, and therefore that the Court cannot give judgment on either of the special pleas, though found for the defendants. But it would be very strange if one

* Absent the Lord Chief Justice.

defendant should plead a good plea, and it were found for him, that he should not have judgment, according to the justice and truth of the case, though the other defendant should plead a bad plea. But why are these customs inconsistent with each other? It might happen, that there might be at first a limited custom, and afterwards a more extensive one, and I do not see why the second should root up the first, or why they might not both exist together, supposing the second to be a good one.

But the real question is, whether the customs as stated are good. It is objected to the first custom, that it is not alleged to be for the necessary recreation of the inhabitants, nor that the defendant Chatteris went into the close in question for his recreation. But in the case in Levinz, the Court say that it is necessary for the inhabitants to have their recreation. If so, it is a matter of law, and though there may be precedents which state such customs to be for either the health or recreation of the inhabitants, yet when the Court lay it down that recreation is necessary, it is not necessary to be averred in pleading. As to the objection that it is not stated that the defendant Chatteris went into the *locus in quo* for his recreation, the words of the plea are, that "he entered into the said close in which, &c. for the purpose of exercising and playing at divers lawful games, sports and pastimes, and at those several times respectively there played at the said game of cricket, and the said other games, sports and pastimes, &c." Now what are sports and pastimes but recreations? With respect to the case in Bro. Abr. Custom, pl. 46, there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land, (which the case in Cro. Car. shows to be good), but either because the digging in the soil, in order to pitch stakes to hang the nets upon, was unnecessary, or it tended to the destruction of the inheritance. But that is not the case here. There is no authority therefore to oppose the case in Levinz; and upon the whole I think that this custom is reasonable, and the plea good.

But I hold the other custom to be as clearly bad, as the first is good. How that which may be claimed by all the inhabitants of

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v.
RAWLING.

England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom. And I perfectly agree that no action could be maintained for interruption of it, any more than in the instance put by my brother *Bond* of a highway. There must be therefore judgment for the defendant Chatteris on the first special plea, and for the plaintiff against the other two defendants.

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HEATH, J.:

I am of the same opinion. The lord might have granted such a privilege, as is claimed by the first custom, before the time of memory. As to the second, it is clearly bad, being for all mankind, and on that the case in Fitzgibbon, 51, is in point.

ROOKE, J.:

There seems to me no objection to the first custom, and no ground for the second.

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Feb. 9.
[399]

DOE, ON THE DEMISE OF CLARKE, *v.* CLARKE AND OTHERS.

(2 H. Bl. 399—401.)

Lands, &c., are devised to B. for life, and after his decease to all and every such child or children of B. as shall be living at the time of his decease: a posthumous child of B. shall share equally with those who were born in his lifetime. An infant *en ventre sa mere* is considered as born, for all purposes which are for his benefit.*

[THIS was an ejectment, brought to recover one undivided fourth part of certain hereditaments. The lessor of the plaintiff was a posthumous child of H. C. claiming under a devise by the testator to his brother the said H. C. and his assigns, for and during the term of his natural life, and from and after the decease of his said brother H. C., to the use and behoof of all

* Cited in the judgment of V.-C. MALINS in *In re Corlass* (1875) 1 Ch. D. 460, 463; 45 L. J. Ch. 118.—R. C.

and every such child or children whether male or female, of his said brother, H. C., as should be living at the time of his decease, as tenants in common, and not as joint-tenants, and of the several and respective heirs and assigns of such child or children for ever."]

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Le Blanc, Serjt. was going to argue on behalf of the lessor of the plaintiff, when the Court said they wished to hear the other side. Accordingly

Bond, Serjt. on the part of the defendants, stated the question to be, whether an infant *en ventre sa mere* at the time of the decease of the father could be considered as a child living at his decease? Unless the will expresses the contrary, a devise to such children of A. who are living at the time of his decease, means to such as are born at that time. 1 Vesey 111, *Ellison* v. *Airey*, *Hales* v. *Hales* there cited, 2 Brown Chan. Cas. 38, *Pierson* v. *Garnet*, id. 63. *Cooper* v. *Forbes*.

LORD CHIEF JUSTICE EYRE:

I have no doubt on any view of this case. It is plain on the words of the will, that the testator meant that all the children whom his brother should leave behind him should be benefited: but independent of this intention, I hold that an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of "children living at the time of his decease."

BULLER, J.:

[401]

In equity, there are two classes of cases on this subject, the first, where the bequest is in the nature of a portion or provision for children, and there an after-born child takes his share with the rest, of which class is the case of *Millar* v. *Turner*, 1 Vesey 85: the second, where the bequest arises from some motives of personal affection, and there it is confined to children actually in existence. Of this second class was the case of *Cooper* v. *Forbes*, which therefore makes a striking difference between that case and the present. Here the bequest is not confined to children

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living at the death of the testator, but is kept open till the death of his brother. It seems indeed now settled, that an infant *en ventre sa mere* shall be cõnsidered, generally speaking, as born for all purposes for his own benefit, *Lancashire* v. *Lancashire*, 5 Term Rep. B. R. 49.* And in a sensible treatise lately published, Watkins's Law of Descents, 142, after a discussion of the interest of posthumous issue, the whole is well summed up by saying, "It is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born."

HEATH, J. of the same opinion.

ROOKE, J. of the same opinion.

LORD CHIEF JUSTICE EYRE:

The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever.

Postea to the plaintiff.

C. P. EASTER TERM.

1795.
April 27.
[441]

MORLEY *v.* GAISFORD.

(2 H. Bl. 441—443.)

An action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant negligently driving his carriage against it.†

THIS was an action on the case, and the declaration, which consisted of only one count, stated that the plaintiff "on, &c. at, &c. was lawfully possessed of a certain carriage called a chaise,

* 2 R. R. 535.

† So where the plaintiff declared in case that A. so negligently steered his vessel, that it ran foul of B.'s, the declaration was held proper, *Ogle* v. *Barnes*, 8 T. R. 188. And where

and of a certain horse then and there drawing the same; and the defendant was then and there also possessed of a certain cart

the plaintiff declared in case against the defendant for sinking his boat, and after averring a non-feazance in the defendant, stated him to have acted with great force and violence; on error brought, it was held, that the plaintiff had declared rightly in case, *Turner* v. *Hawkins*, 1 Bos. & Pul. 472. Again, where the declaration was for driving the defendant's cart against the plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care" of the defendant, the Court of Common Pleas on demurrer held, that case was the proper form of action, *Rogers* v. *Imbleton*, 2 Bos. & Pul. N. R. 117. So in *Huggett* v. *Montgomery*, Id. 446, the same Court held, that if one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case. So also, where an action in case was brought against three defendants, and the declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg; and it appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving, it was held, that the plaintiff might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach, *Moreton* v. *Hardern*, 4 B. & C. 223.

On the other hand, in *Leame* v. *Bray*, 3 East, 593, an action of trespass against the defendant for accidentally driving his carriage against another's, was held rightly brought; and in *Covell* v. *Laming*, 1 Campb. N. P. C. 497, it was held, that if the owner of a ship being himself on board, and standing at the helm, unintentionally runs her against another ship by unskilful management, trespass is maintainable. So in *Lotan* v. *Cross*, 2 Campb. N. P. C. 464, where the defendant had run against and injured the plaintiff's chaise, Lord ELLENBOROUGH held, that trespass was the proper remedy. So also, where the defendant drove a chaise against another chaise, in which the plaintiff's wife was then riding, whereby she sustained an injury, the Court of Common Pleas held, that the action was rightly brought in trespass by the husband and wife, *Hopper and Wife* v. *Reeve*, 1 B. Moore, 407.

Upon the whole, the following distinctions seem deducible from the cases on this subject.

I. Where the injury arises from the negligence of the defendant, and the act is at the same time immediate, as where the defendant by negligent driving runs against the plaintiff's carriage, the plaintiff may maintain case for the negligence, waving the trespass. As to the latter point, see *Hall* v. *Pickard*, 3 Campb. N. P. C. 188, where it is said by Lord ELLENBOROUGH, that it may be worthy of consideration whether in those instances in which trespass may be maintained, the party may not waive the trespass and proceed for the tort: see also *Branscomb* v. *Bridges*, 1 B. & C. 145. So it is said by BAYLEY, J., in observing upon the case of *Leame* v. *Bray*, that "at the trial Lord ELLENBOROUGH thought it should have been case, but on further consideration, the Court was of opinion that trespass was maintainable, but they did not decide

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MORLEY v. GAISFORD.

and a certain horse, then and there drawing the said cart, and then and there by a certain then servant of him the said defendant, had the care, conduct, and management of the said horse and cart of the said defendant, and of the driving thereof, to wit, at, &c. yet the said defendant by his said servant then and there so negligently and unskilfully managed and behaved himself in the premises, and so badly, ignorantly, and negligently, drove, managed, guided, and governed the said cart and horse of the said [443] defendant, that the said cart for want of good and sufficient care and management thereof, and of the said horse so then and there drawing the same as aforesaid, then and there struck and ran to and against the said chaise of the said plaintiff with great force and violence, and then and there pulled, forced, and dragged the same to a great distance, and then and there broke to pieces, destroyed, and damaged the said chaise, and one of the wheels of the said chaise, and the shaft thereof, to wit, at, &c. whereby the said chaise of the said plaintiff then and there became and was crushed, broken, damaged, and injured, and he the said plaintiff was forced and obliged to lay out and expend, and did lay out and expend a large sum of money, to wit, the sum of 30*l.* in and about the repairs and amendment thereof, to wit, at &c. to the damage, &c."

A verdict having been found for the plaintiff,

that an action on the case would have been improper." *Moreton* v. *Hardern*, 4 B. & C. 226. But instead of waiving the trespass, the plaintiff may, if he please, proceed for the immediate injury, and bring an action of trespass.

II. Where the injury arises from the negligence of the defendant's servants, case only, and not trespass, is maintainable against the master.

III. Where the injury arises not from the negligence of the defendant, but the act is both wilful and immediate, trespass is the proper form of remedy.

IV. Where the injury is not immediately, but only consequential upon the act done, the remedy is case, and not trespass.

V. Where the plaintiff is the owner, but not entitled to the immediate possession of a chattel, injured by the defendant driving violently against it, case, and not trespass, must be brought, *Hall* v. *Pickard*, 3 Campb. N. P. C. 187. But a mere gratuitous permission to a third person to use a chattel, does not take it out of the possession of the owner so as to prevent him from maintaining trespass for an injury done to it while it is so used. *Lotan* v. *Cross*, 2 Campb. N. P. C. 464.

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Cockell, Serjt. now moved in arrest of judgment on the ground that the action ought to have been trespass, and not case, as the injury was direct, and not consequential. It was not necessary, he said, that the act done should be unlawful, to make it a ground of trespass; as if a man lift up a stick to defend himself, and by accident strike another, there, though the act was lawful, yet trespass lies. *A fortiori* therefore where the act is unlawful, as in the present instance, trespass is the proper remedy. And he cited *Day* v. *Edwards*, 5 Term Rep. B. R. 648, and *Savignac* v. *Roome*, 6 Term Rep. B. R. 125, where the ground of the decision was, not that the act was wilful, as the counsel contended, but that there was a direct, and not a consequential injury.

The COURT seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered as a trespasser for an act of his servant,* which was not done at his command; but they said, that respect for the decisions of the Court of King's Bench would induce them to give the point farther consideration, and accordingly, a rule to shew cause was granted; but a few days afterwards, *Cockell* acknowledged that the rule could not be supported, in which the Court concurred, being clearly of opinion that case, and not trespass, was the proper form of action.

Rule discharged.

SMITH AND OTHERS, ASSIGNEES OF EUSTACE, A BANKRUPT, *v.* COFFIN AND UX.

(2 H. Bl. 444—463.)

1795. *April* 28.

[444]

A. by his will reciting "as to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and "devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever to B. for his own use, benefit, and disposal." Under this clause, B. took an estate in fee in the lands of the testator.

[THIS action involved a question upon the construction of a will.]

* That a master is not liable in trespass for the wilful act of his servant, though he is answerable in an action on the case for his negligence, *vide M'Manus* v. *Crickett*, 1 East, 106; *Leame* v. *Bray*, 3 East, 601.

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Thomas Eustace the father, being seised in fee of the messuage in Saint Sidwell's mentioned in the declaration, and also having an interest in a house in another parish, in which he then lived, made his will bearing date the third day of May, 1763, in the following words; "As to such worldly estate, as God in his kind providence has been pleased to bless and favour me with, I give and dispose of the same in manner and form following, that is to say; First, I give and bequeath unto my son Thomas Eustace the sum of two hundred pounds of lawful money of Great Britain, to be paid unto him out of my residuary estate and effects, by my executrix hereinafter named, when and if he shall attain the age of twenty-one years; but my will is, that if he shall happen to die under that age, that the said sum of two hundred pounds shall sink in my residuary estate, for the benefit of my said executrix. Also my will is, that my said son shall as soon after my decease, as my said executrix shall think fit and convenient, be by her placed and bound out to some trade, profession or business, and that she do and shall by and out of my said residuary estate, pay the consideration-money to be paid or given with him on that occasion, and also provide for, maintain and educate my said son, until he shall be so placed and bound out as aforesaid, in a decent and suitable manner, and during the time of such his apprenticeship, and until he shall attain his said age of twenty-one years or die, which shall first happen, find and provide for, and allow and give unto him proper and suitable clothes, and wearing apparel, and all other necessaries whatsoever, except such as the master with whom he may be placed and bound out, shall in and by the indenture of apprenticeship for that purpose to be made and executed, covenant and agree to provide, it being my express will and intention, that my said son shall be as much the object of my said executrix's care as he would have been of mine had I been living, to educate, provide for and maintain him. Also all that my messuage, tenement or dwelling-house, wherein I now live, with the appurtenances and the reversions, remainders, rents, issues and profits thereof, (subject nevertheless with my personal estate, to the payment of the said legacy of two hundred pounds to my son, when and if he shall attain his said age of twenty-one years as

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aforesaid,) I hereby give and devise unto my dear wife Hannah Eustace her heirs and assigns for ever, also all the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate whatsoever, wheresoever, and in whose hands soever, not hereinbefore particularly given and bequeathed, (subject nevertheless to the payment of the said legacy of two hundred pounds to my said son, and to such provision for binding out, maintaining and educating him as aforesaid, and [448] also to the payment of all my just debts and funeral expenses, to and with the payment whereof, I hereby subject and charge the same,) I hereby give and bequeath unto my said dear wife Hannah Eustace for her own use, benefit and disposal. Lastly, I hereby make, ordain, nominate and appoint my said wife Hannah Eustace, whole and sole executrix of my last will and testament."

In June, 1763, the testator died, and his widow Hannah Eustace entered into possession of the house in St. Sidwell's by virtue of the residuary clause in the will, and received the rents and profits until her death. And the question for the opinion of the Court was,

Whether she took any, and what estate in the said messuage in St. Sidwell's under the will?

[This question having been argued, the following judgments were given thereon:]

BULLER, J.: [450]

Cases of this sort depend on niceties of expression, and sometimes even on a single word, and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question always must be, what was the intention of the testator? That is the polar star by which we must be guided. Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause may include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part. This case is different both from *Denn* v. *Gaskin** and *Shaw* v. *Russell*,† for in neither of those cases

* Cowp. 657. † Cited in judgment of same case, pp. 660, 661.

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did the introductory clause profess to dispose of all the property of the testator. That circumstance distinguishes this case, and brings it within the authority of that of *Grayson* v. *Atkinson*,* before Lord Hardwicke, where the introductory clause was, "as to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows." Here the testator meant to devise all his property; the word testamentary is as well applicable to real as to personal estate; and if it be not applied in this case to the real property, it is merely tautologous; and in construing wills the Court will, if possible, give a meaning to every word. I am therefore of opinion that there should be judgment for the defendant.

[451] HEATH, J.:

I am of the same opinion, and my reasons are these: first, the testator sets out with declaring his intention to dispose of all his property; secondly, he leaves 200*l.* to his heir at law; and thirdly, the residuary clause is sufficient to pass the estate in question; for the word testamentary is a most comprehensive term, and we should interpret it in much too narrow a sense, if we were to confine it to personal property. And there are no circumstances in the will to control this body of evidence, if it may be so called. Wills are frequently made *in extremis*, sometimes when the agonies of death are approaching, and it would be unfair to construe strictly the words used by an ignorant testator in that situation. Here, after the devise of the personal estate he might have changed his mind, and designed to give also his real estate, by the residuary clause. The word testamentary may therefore be considered as declaratory of a subsequent intention to that effect.

ROOKE, J. of the same opinion.

* 3 Burr. 1618.

BOULTON AND WATT *v.* BULL.

(2 H. Bl. 463—501.)

1795. *May* 16.

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HORNBLOWER AND MABERLY *v.* BOULTON AND WATT.

(8 T. R. 95—108.)

A patent was granted to A. B. for a *newly invented method* of using an old machine in a more beneficial manner than was before known. The specification described the *method* as consisting of certain *principles*, and described the mode of applying those principles to the purposes of the invention in a manner sufficient to enable a mechanic conversant with the engines then in use to construct an engine having the advantages described: Held on error from judgment upon verdict for the plaintiff, that the patent was valid.

[EACH of these actions (in the latter of which the defendants in error were the original plaintiffs), was brought in the form of an action on the case for infringing a patent. In both actions it was the same patent which came into question, namely that containing Watt's original description of his celebrated invention of the *separate condenser.*

By letters patent under the Great Seal dated the 5th of January, 1769, the King granted to the plaintiff James Watt the sole benefit and advantage of making, exercising and vending a certain invention, being a method by the said James Watt invented of lessening the consumption of steam and fuel in fire-engines, for the term of fourteen years, with a proviso for a specification in the usual manner. The letters patent were extended by an Act of Parliament (15 Geo. III.) to a term of twenty-five years, subject to a proviso that, except as regards the extension of the term, every objection in law competent against the original patent should be competent against the privilege under the Act.

On the trial in the former action (*Boulton & Watt* v. *Bull*) a case was reserved for the opinion of the Court, which after stating the letters patent, stated the specification and the other relevant facts as follows:

The specification was as follows]: "My method of lessening [465]
the consumption of steam, and consequently fuel in fire engines,

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consists of the following principles. First, that vessel in which the powers of steam are to be employed to work the engine, which is called the cylinder in common fire engines, and which I call the steam vessel, must during the whole time the engine is at work, be kept as hot as the steam that enters it; first, by inclosing it in a case of wood, or any other materials that transmit heat slowly; secondly, by surrounding it with steam or other heated bodies; and thirdly, by suffering neither water nor any other substance colder than the steam, to enter or touch it during that time. Secondly, in engines that are to be worked wholly or partially by condensation of steam, the steam is to be condensed in vessels distinct from the steam vessels, or cylinders, although occasionally communicating with them. These vessels I call condensers, and whilst the engines are working, these cylinders ought at least to be kept as cool as the air in the neighbourhood of the engines, by application of water or other cold bodies. Thirdly, whatever air or other elastic vapour is not condensed by the cold of the condenser, and may impede the working of the engine, is to be drawn out of the steam vessels or condensers by means of pumps wrought by the engines themselves, or otherwise. Fourthly, I intend in many cases to employ the expansive force of steam to press on the pistons, or whatever may be used instead of them, in the same manner as the pressure of the atmosphere is now employed in common fire engines. In cases where cold water cannot be had in plenty, the engines may be wrought by this force of steam only, by discharging the steam into the open air after it has done its office. Fifthly, where motions round an axis are required, I make the steam vessels in form of hollow rings or circular channels, with proper inlets and outlets for the steam, mounted on horizontal axles, like the wheels of a water mill; within them are placed a number of valves, that suffer any body to go round the channel in one direction only. In these steam vessels are placed weights, so fitted to them as entirely to fill up a part or portion of their channels, yet rendered capable of moving freely in them, by the means hereinafter mentioned or specified. When the steam is admitted in these engines between these weights and the valves, it acts equally on both, so as to raise the weight to one side of

the wheel, and by the re-action on the valves successively, *to give a circular motion to the wheel, the valves opening in the direction in which the weights are pressed, but not on the contrary: as the steam vessel moves round, it is supplied with steam from the boiler, and that which has performed its office may either be discharged by means of condensers, or into the open air. Sixthly, I intend in some cases to apply a degree of cold not capable of reducing the steam to water, but of contracting it considerably, so that the engines shall be worked by the alternate expansion and contraction of the steam. Lastly, instead of using water to render the piston or other parts of the engines air and steam tight, I employ oils, wax, resinous bodies, fat of animals, quicksilver, and other metals in their fluid state."

By a memorandum added to the said specification, the inventor declared, that he did not intend that any thing in the fourth article should be understood to extend to any engine where the water to be raised enters the steam vessel itself, or any other vessel having an open communication with it. In the fire engines referred to in the said specification, and which were in use prior to the patent in question, motion was given to the piston by the pressure of the atmosphere acting upon one side of it, while a vacuum or certain degree of exhaustion was produced on the other side within the steam vessel denominated the cylinder, by means of the injection of cold water, whereby the steam was condensed; which operation, prior to the invention of the said James Watt, was always performed in the steam vessel or cylinder itself; when the steam had been condensed, and the piston had descended, such portions of air and water as remained under it within the steam vessel or cylinder, were expelled through valves by the next succeeding steam from the boiler, and that steam counterbalancing the pressure of the atmosphere at the open end of the cylinder, allowed the piston to rise up with that end of the lever to which it was attached, while the other end of the lever and the matters attached thereto descended by reason of their greater comparative weight, and thus the engine was restored to that state in which it was previous to the first condensation. The steam was, for this purpose, as occasion required, admitted through a pipe from a distinct vessel called

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the boiler, where it was generated, which occasionally communicated with the cylinder *by means of a valve, which was opened and shut by the action of the engine. The injection of cold water was in like manner admitted, as occasion required, into the cylinder through a pipe from another distinct vessel containing cold water, called the injection cistern, by means of a cock or valve which was also opened and shut by the action of the engine, and such pumps as were used in these engines were also wrought by the engines themselves. The construction and use of pumps for drawing out air, elastic vapour, or water from places or vessels where a vacuum or exhaustion was required, were known and practised before the obtaining the letters patent above mentioned, but had not been applied to the cylinders or condensers of steam engines. The said invention of the said James Watt was at the time of making the said letters patent, a new and a useful invention, and the said privilege vested by the said Act of Parliament in the said James Watt and his assigns, was infringed by the defendant in the manner charged upon him by the declaration. The said specification made by the said James Watt, is of itself sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect of lessening the consumption of fire and steam in fire engines, upon the principle invented by the said James Watt.

And the questions for the opinion of the Court were,

1st. Whether the said patent was good in law, and continued by the Act of Parliament above mentioned?

2nd. Whether the above specification of the plaintiff James Watt was in point of law sufficient to support the above patent?

This case was twice argued, the first time by *Watson*, Serjt. for the plaintiffs, and *Le Blanc*, Serjt. for the defendant; and the second, by *Adair*, Serjt. for the plaintiffs, and *Williams*, Serjt. for the defendant.

On the part of the plaintiffs, the substance of the arguments was the following. The plaintiffs have a right to recover damages for the infringement of their patent, which is: 1st, both

good in law, and continued by the Act 15 Geo. III. c. 61: and 2ndly, duly supported by the specification. It is good in law, as being for a newly discovered method of producing an important effect in the use of the old steam-engine, and comes within the provision of the stat. 21 Jac. I. c. 3, s. 6, *which protects inventions of this kind from the declaration mentioned in the former part of the statute. By every fair rule of construction, the words "working or making any manner of new manufactures," must include the invention of the plaintiffs. The term "manufacture" means "any thing made or produced by art," and the method or invention for which the patent is granted, is to produce an effect by artificial means, by which the consumption of fuel shall be lessened in steam-engines. Whether the word "method" be used as in the patent, or "engine" as in the Act for continuing it, the meaning is obviously the same, and the Court will not deprive the plaintiffs, the merit and utility of whose invention is on all sides admitted, of the benefit of that invention by mere verbal criticisms. [*468]

HEATH, J.:

When a mode of doing a thing is referred to something permanent, it is properly termed an engine: when to something fugitive, a method.

This patent is not expressed in terms new or unusual; almost all the patents upon record that have been granted to those who have made discoveries or improvements in the mechanic arts, being for the method of doing the thing, and not for the thing done.

HEATH, J.:

Is there any instance of a patent for a mere method?

The patent granted to Dollond for his improvement in making the object-glasses of telescopes was, for "an invention of a new method of making the object-glasses of refracting telescopes." So also, David Hartley's patent was for his method of securing buildings from fire. So likewise are the numerous patents that

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have been granted for the different improvements which have been made of late years, in chemistry and medicine.* The patent, therefore, of the plaintiffs, is good in law; and it is also continued by the Act 15 Geo. III. That Act expressly recites the patent, and extends the benefit of it for twenty-five years to Watt and his assigns. It was therefore clearly the intention of the legislature that the patent already granted should be continued, and the Court will construe the Act in such a manner as to effectuate that intention.

With regard to the specification, that is sufficiently explicit to support the validity of the patent. The improvement made by Watt consists in a discovery, that by letting out the steam from [469] the cylinder into another vessel in order to condense it, instead of admitting cold water into the cylinder for that purpose, as was done in Newcomen's engine, and by keeping the cylinder hot, the consumption of steam and consequently of fuel would be diminished. The communication between the cylinder and the other vessel is formed by means of valves, which were before in use in Newcomen's engine, and therefore not necessary to be more accurately described, and the mode of keeping the cylinder hot is explicitly stated in the specification. There is no new mechanical construction invented by Watt, capable of being the subject of a distinct specification, but his discovery was of a principle, the method of applying which is clearly set forth, and therefore a drawing or model would have been unnecessary. So in Dollond's patent, (to take one of many instances) the specification describes the principle, but not the mechanical construction by which it is carried into effect. It recites, that a patent had been granted to him for the "invention of a new method of making the object glasses of refracting telescopes, by compounding mediums of different refractive qualities, whereby the errors arising from the different refrangibility of light, as well as those which are produced by the spherical surfaces of the glasses, were perfectly corrected." It then goes on to state, after mentioning the defects of the telescopes then in use, that in the new telescopes the images of objects were formed by the difference

* A great variety of patents of this kind were cited which it is not necessary to repeat, as they all went to the same point.

between two contrary refractions, the object-glass being a compound of two or more glasses put close together, whereof one was concave and the other convex: that the excess of refraction by which the image was formed was in the convex glass, which was made of a medium or substance in which the difference of refrangibility was not so great as in the substance of which the concave glass was formed; therefore, their refractions being proportioned to their difference of refrangibility, there remained a difference of refraction by which the image was formed, without any difference of refrangibility to disturb the vision: and that the radii of the surfaces of each of those glasses were likewise so proportioned, as to make the aberrations which proceeded from their spherical surfaces respectively equal, which being also contrary, destroyed each other. But there is no mention of any mechanism, nor does the specification state the degrees of sphericity or curvature of the concave or convex glasses, because it is well known that the curvature of one must be proportioned to that of the other, in order to correct the refrangibility of the rays of light. It is also to be observed, [470] that the jury have found that the specification is sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect of lessening the consumption of fire and steam upon the principle invented by the plaintiff Watt. It is upon the whole, therefore, submitted to the Court, that both the questions stated in the case must be answered in the affirmative.

BULLER, J.:

The objection to Dollond's patent was, that he was not the inventor of the new method of making object-glasses, but that Dr. Hall had made the same discovery before him. But it was holden, that as Dr. Hall had confined it to his closet, and the public were not acquainted with it, Dollond was to be considered as the inventor.

On the part of the defendant the arguments were the following. * * *

In considering the case upon the patent itself, the patent

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appears to be void, because it differs from the specification, the patent being for a formed instrument or machine, but the specification for principles unorganized. It is for a new invented method. Now the word invention, when applied to mechanical subjects, properly signifies something which has been already formed, some manufacture or machine, and is not applicable to mere unorganized principles. The plaintiff Watt cannot be said to have invented the principles, for those principles were in use in the old or Newcomen's steam engine. It is true, that the application of those principles in the manner described in the specification is new, but it was well known long before that steam had an expansive power, and was condensed by cold. It is in this sense that the word invention is used in the patent. It recites "that Watt had represented to the King, that he had after much labour and expense invented a method of lessening the consumption of steam and fuel in fire engines." From these words it seems clear that he meant it to be understood by the Crown, that the invention which he represented himself as having made, was completely formed, and not that he had merely conceived in his mind the application of certain known [471] principles by which the consumption of steam and fuel would be lessened in fire-engines: for the ideas of the principles before they were organized could not have been attended with great labour, and much less with great expense. That the representation was understood in this sense by the Crown, will appear from considering other parts of the patent itself. The King grants to Watt that he shall "make, use, exercise and vend his said invention." In another part of the patent all persons are forbidden to counterfeit, imitate or resemble the same invention, and to make or cause to be made any addition thereto, or subtraction therefrom. In another part it is provided, that the patent shall not extend to give privilege to Watt to use or exercise any invention or work whatsoever which had theretofore been found out or invented by any other, and publicly used or exercised, but that every other person should use and practise their several inventions. Now it is impossible that any of the expressions thus cited from the patent can be applied to the invention of mere unorganized principles of science. If then

the patent be, which it clearly is, for a formed instrument or machine, it is void, because it is admitted that there is no specification descriptive of any formed instrument whatever, nor is there any drawing or model.

[But supposing it to be a patent for mere principles, (for the specification states that the invention consists of principles,) it is not good in law under the statute 21 Jac. I.] The word manufacture is descriptive either of the practice of making a thing by art, or of the thing when made. * * That this [472] is the true meaning of the term manufacture as it is used by the Legislature, likewise appears from the words making or working being applied to it, and "which others at the time shall not use," and also from the provision that the patentee shall ascertain the nature of his invention, and in what manner the same is to be performed. * * In the construction of specifications it is a rule that the patentee must describe his invention in such a manner that other artists in the same trade or business may be taught to do the same thing for which the patent is granted, by following the directions of the specification alone, without any new invention or addition of their own, and without the expense of trying experiments. 1 Term Rep. B. R. 606. *Turner* v. *Winter*.* This necessarily excludes any supposition that mere principles can be the subject of a patent. That this is the true construction of the word manufactures in the statute, appears also from Lord Coke's commentary on it, 3 Inst. 184, who, as appears from the journals of the House of Commons, was chairman of the committee to whom the bill was referred, and who therefore probably either drew or perused it. * * In *Sir Richard Arkwright's* case † the learned judge before whom it was tried, stated in his summing up, that for a principle alone a patent could not be obtained, for which he [473] gave very convincing reasons. And independent of authorities, the reason of the thing shews that such a patent could not be obtained within the meaning of the statute. By obtaining a patent for principles only, instead of one for the result of the

* 1 R. R. 311—317.

† See the printed account of that trial, at the sittings at Westminster after Trinity Term, 25 Geo. III. before Mr. J. Buller.

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application of them, the public is prevented, during the term from improving on those principles, and at the end of the term is left in a state of ignorance as to the best, cheapest and most beneficial manner of applying them to the end proposed.

It is true indeed that the jury have found, "that the specification made by Watt, is of itself sufficient to enable a mechanic acquainted with fire engines previously in use, to construct fire-engines, producing the effect of lessening the consumption of fuel and steam in fire engines, upon the principle invented by Watt." But it is not found that the specification would enable a mechanic to construct Watt's fire engines; nor is it found to what extent the consumption of steam and fuel would be lessened in fire engines constructed upon the principles stated in the specification; nor whether those engines would have the effect of lessening the consumption of steam to the same degree with Watt's engines. All this is left uncertain. * * The specification ought to have described the method by which the machine might be made to save the greatest quantity of fuel which it was known to be capable of saving, and which it in fact does save when used by the inventor. It is a settled rule of law that if a patentee makes the thing for which the patent is granted with cheaper materials, or if he applies and uses it in a more advantageous and useful manner than is described in the specification, the patent is void, because he does not put the public in possession of his invention, or enable them to derive the same benefit that he himself derives from it. 1 Term Rep. B. R. 602, *Turner* v. *Winter*.

[The defendant also argued upon the construction of the Act by which the patent was continued; but this part of the argument is not of any general interest.]

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The sum of the reply was as follows. The patent is neither for a formed instrument, nor is the specification for a principle unorganized. The former is for "a new invented method of lessening the consumption of steam and fuel in fire engines," by whatever mode that effect may be produced: the latter states both the principle of the invention, and also the mode in which it is to operate, namely, the preserving the cylinder hot by the means described, and the condensing the steam in separate

vessels communicating with the cylinder. The difference in the terms used in the patent and the specification, arises from the nature of the subject, but the real meaning of them is the same. Where an improvement is made upon a machine already known, the patent ought not to be for the machine itself, but for the method of improving it. Thus a patent was granted in 1759, to one Wood "for a scheme to work a fire-engine, at half the expense of coals," an effect which must have been caused by an alteration of the engine, yet the patent was for the scheme, or method, and not for the engine itself. And in the case of an improvement in making watches, Jessop's patent was avoided, because it was for the whole watch, when the invention consisted of only one movement. But notwithstanding this rule, if from the nature of the thing a patent for the new method or improvement only should have the effect of giving a right to the whole machine, that is not of itself a ground on which the patent can be set aside.

On this day, after consideration, the judges thus delivered their respective opinions.

ROOKE, J. after stating the special case at length, thus proceeded: [477]

From this state of the case, and from the admission of counsel on both sides, I assume the following facts, viz. that the plaintiff Watt is the inventor of a new and useful improvement in fire-engines, whereby the consumption of steam, and consequently of fuel is considerably lessened: that the improvement is of such a nature that it may legally be the object of protection by royal patent: that a patent has been granted to the inventor, on the condition of a specification of the nature of the invention: that a specification has been made, sufficient to enable a mechanic to construct fire-engines containing the improvement invented by the patentee: and that the Legislature six years after the patent had been granted, thought proper to extend the duration of it from the eight years then to come, to twenty-five years, the patent having been granted in the ninth, and the statute having passed in the fifteenth year of the present king.

Under these circumstances, I think I conform to the spirit of

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the stat. 21 Jac. I. c. 3, s. 6, if I incline to support this patent, provided it may be supported without violating any rule of law: and I think so for two reasons, first, because the patentee is substantially entitled to the protection of the patent, and secondly because the public are sufficiently instructed, and will be duly benefited by the specification. Against the claim of the patentee certain objections have been made, which, it is contended, deprive him of all legal right to that protection. First it is objected that the patent is not for fire-engines upon the particular construction which contains this new improvement, but for a new invented method of lessening the consumption of steam and fuel: secondly, it is objected, that no particular engine is described in this specification, but that it only sets forth the principles: and the last objection is, that the statute has not duly prolonged the patent, because the patent is for a method, and the statute for an engine. It is obvious that these objections are merely formal: they do not affect the substantial merits of the patentee, nor the meritorious consideration which the public have a right to receive, in return for the protection which the patentee claims. With regard to the first objection, it is that the patent is not for a fire-engine of a particular construction, but for a new invented method. It pre-supposes the existence of the fire-engine, and gives a monopoly to the patentee of his new invented method of lessening the consumption of steam and fuel in fire-engines. The obvious meaning of those words is, that he has made an improvement in the construction of fire-engines, for what does method mean but mode or manner of effecting? What method can there be of saving steam or fuel in engines, but by some variation in the construction of them? A new invented method therefore conveys to my understanding the idea of a new mode of construction. I think those words are tantamount to fire-engines of a newly invented construction; at least I think they will bear this meaning, if they do not necessarily exclude every other. The specification shews that this was the meaning of the words as understood by the patentee, for he has specified a new and particular mode of constructing fire-engines. If he has so understood the words, and they will bear this interpretation, then I think this objection, which is merely

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verbal, is answered. To which I add, that patents for a method or art of doing particular things have been so numerous, according to the lists left with us, that method may be considered as a common expression in instruments of this kind. It would therefore be extremely injurious to the interests of patentees, to allow this verbal objection to prevail. As to the second objection, that no particular engine is described, that no model or drawing is set forth, I hold this not to be necessary, provided the patentee so describes the improvement as to enable artists to adopt it when his monopoly expires. The jury find that he has so described it. It is objected, that he professes to set forth principles only; but we are not bound by what he professes to do, but by what he has really done. If he had professed to set forth a full specification of his improvement, and had not set it forth intelligibly, his specification would have been insufficient, and his patent void. It seems therefore but reasonable, that if he sets forth his improvement intelligibly, his specification should be supported, though he professes only to set forth the principle. The term principle is equivocal; it may denote either the radical elementary truths of a science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles. The radical principles on which all steam engines are founded, are the natural properties [479] of steam, its expansiveness and condensibility. Whether the machines are formed in one shape or another, whether the cylinder is kept hot or suffered to cool, whether the steam is condensed in one vessel or another, still the radical principles are the same. When the present patentee set his inventive faculties to work, he found fire-engines already in existence, and the natural qualities of steam already known and mechanically used. He only invented an improvement in the mechanism, by which they might be employed to greater advantage. There is no newly discovered natural principle as to steam, nor any new mechanical principle in his machine; the only invention is a new mechanical employment of principles already known. As to the specification, some part of it, so much as represents the future intentions of the patentee, may be considered, according

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to the language of the specification, as merely theoretical; but the greater part describes a practical use of improved mechanism, the basis on which the improvement is founded. The object of the patentee was to condense the steam without cooling the cylinder: the means adopted to effectuate this were to enclose the cylinder in a case which will confine the heat or transmit it slowly, to surround it with steam or other heated bodies, and to suffer neither water nor any other substance colder than the steam, to enter or touch it during that time. These means are set forth. The objection is, that there is no drawing or model of a particular engine; and where is the necessity of such drawing or model, if the specification is intelligible without it? Had a drawing or model been made, and any man copied the improvement, and made a machine in a different form, no doubt this would have been an infringement of the patent. Why? Because the mechanical improvement would have been introduced into the machine, though the form was varied. It follows from thence, that the mechanical improvement, and not the form of the machine, is the object of the patent; and if this mechanical improvement is intelligibly specified, of which a jury must be the judges, whether the patentee call it a principle, invention, or method, or by whatever other appellation, we are not bound to consider his terms, but the real nature of his improvement, and the description he has given of it, and we may I think protect him without violating any rule of law. As to the articles of the specification which denote intention only, and do not state the thing to which it is [480] to be applied, I do not think he could maintain an action for breach of these articles; for he cannot anticipate the protection, before he is entitled to it by practical accomplishment. But the patent is for a method already adopted, and the two first and most material articles are set forth as already accomplished, and the case states it was new and useful at the time of making the patent. I therefore consider the most essential part of the patent, the keeping the cylinder hot, inclosing it in a case, and surrounding it with steam, as carried into practical effect at the time of granting the patent; this the defendant has infringed; and I will presume after verdict, where nominal damages only

are given, that the evidence was applied to, and the damages given for those articles only which are well specified. Now if he has infringed those articles which are well specified, he shall not be excused from an action, because he has been guilty of an additional infringement on that which is specified as matter of intention only. As to the objection of the want of a drawing or model, that at first struck me as of great weight. I thought it would be difficult to ascertain what was an infringement of a method, if there was no additional representation of the improvement, or thing methodized. But I have satisfied my mind thus: infringement or not, is a question for the jury; in order to decide this case, they must understand the nature of the improvement or thing infringed; if they can understand it without a model, I am not aware of any rule of law which requires a model or a drawing to be set forth, or which makes void an intelligible specification of a mechanical improvement, merely because no drawing or model is annexed. In the present case, I do not hear that the want of a drawing or a model occasioned any difficulty to the jury; they have expressly decided that Mr. Watt has the merit of a new and an useful invention, and that this invention was infringed by the defendant. How then can I say, that they could not understand it for the want of a drawing? Especially when they have added, that the specification is sufficient to enable a mechanic acquainted with the fire-engines previously in use, to construct fire-engines producing the effect of lessening the consumption of fuel and steam, upon the principle invented by the plaintiff. For these reasons I think the second objection, that no particular engine is set forth, is not of sufficient weight to destroy the effect of the patent.

HEATH, J.: [481]

This patent is expressly for a new invented method for lessening the consumption of steam and fuel in fire-engines. It appears that the invention of the patentee is original, and may be the subject of a patent; but the question is, inasmuch as this invention is to be put in practice by means of machinery, whether the patent ought not to have been for one or more machines, and whether this is such a specification as entitles him to the

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monopoly of a method? If method and machinery had been used by the patentee as convertible terms, and the same consequences would result from both, it might be too strong to say, that the inventor should lose the benefit of his patent, by the misapplication of his term. In truth it is not so. His counsel have contended for the exclusive monopoly of a method of lessening the consumption of steam and fuel in fire-engines, and that therefore would better answer the purposes of the patentee, for the method is a principle reduced to practice; it is in the present instance the general application of a principle to an old machine. There is no doubt that the patentee might have obtained a patent for his machinery, because the Act of Parliament he obtained acknowledged his patent, and he himself in 1782 procured a patent for his invention of certain new improvements upon steam and fire-engines for raising water &c., which contained new pieces of mechanism, applicable to the same. Upon this statement the following objections arise to the patent, which I cannot answer: namely that if there may be two different species of patents, the one for an application of a principle to an old machine, and the other for a specific machine, one must be good and the other bad. The patent that admits the most lax interpretation should be bad, and the other alone conformable to the rules and principles of commom law, and to the statute on which patents are founded. The statute 21 Jac. I. prohibits all monopolies, reserving to the king by an express proviso so much of his ancient prerogative, as shall enable him to grant letters patent and grants of privilege, for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures. What then falls within the scope of the proviso? Such manufactures as are reducible to two classes. [482] The first class includes machinery, the second substances (such as medicines) formed by chemical and other processes, where the vendible substance is the thing produced, and that which operates preserves no permanent form. In the first class the machine, and in the second the substance produced, is the subject of the patent. I approve of the term manufacture in the statute, because it precludes all nice refinements; it gives us to under-

stand the reason of the proviso that it was introduced for the benefit of trade. That which is the subject of a patent, ought to be specified, and it ought to be that which is vendible, otherwise it cannot be a manufacture. This is a new species of manufacture, and the novelty of the language is sufficient to excite alarm. It has been urged that other patents have been litigated and established; for instance Dollond's, which was for a refracting telescope. I consider that as substantially an improved machine. A patent for an improvement of a refracting telescope, and a patent for an improved refracting telescope, are in substance the same. The same specification would serve for both patents, the new organisation of parts is the same in both. I asked in the argument for an instance of a patent for a method, and none such could be produced. I was then pressed with patents for chemical processes, many of which are for a method, but that is from an inaccuracy of expression, because the patent in truth is for a vendible substance. To pursue this train of reasoning still further, I shall consider how far the arguments in support of this patent will apply to the invention of original machinery founded on a new principle. The steam engine furnishes an instance. The Marquis of Worcester discovered in the last century, the expansive force of steam, and first applied it to machinery. As the original inventor he was clearly entitled to a patent. Would the patent have been good applied to all machinery, or to the machines which he had discovered? The patent decides the question. It must be for the vendible matter, and not for the principle. Another objection may be urged against the patent, upon the application of the principle to an old machine, which is, that whatever machinery may be hereafter invented would be an infringement of the patent, if it be founded on the same principle. If this were so it would reverse the clearest positions of law respecting patents for machinery, by which it has been always holden, that the organisation of a machine may be the subject of a patent, but principles cannot. If the argument for the patentee were correct, it would follow, [483] that where a patent was obtained for the principle, the organization would be of no consequence. Therefore the patent for the application of the principle must be as bad as the patent for the

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principle itself. It has been urged for the patentee, that he could not specify all the cases, to which his machinery could be applied. The answer seems obvious, that what he cannot specify, he has not invented. The finding of the jury that steam-engines may be made upon the principle stated by the patentee, by a mechanic acquainted with the fire-engines previously in use, is not conclusive. This patent extends to all machinery that may be made on this principle, so that he has taken a patent for more than he has specified; and as the subject of his patent is an entire thing, the want of a full specification is a breach of the conditions, and avoids the patent. Indeed it seems impossible to specify a principle, and its application to all cases, which furnishes an argument that it cannot be the subject of a patent. It has been usual to examine the specification, as a condition on which the patent was granted. I shall now consider it in another point of view. It is a clear principle of law that the subject of every grant must be certain. The usual mode has been for the patentee to describe the subject of it by the specification: the patent and the specification must contain a full description. Then in this, as in most other cases, the patent would be void for the uncertain description of the thing granted, if it were not aided by the statute. The grant of a method is not good, because uncertain, the specification of a method or the application of principle is equally so, for the reasons I have alleged.

BULLER, J.:

Few men possess more ingenuity, or have greater merit with the public, than the plaintiffs on this record; and if their patent can be sustained in point of law, no man ought to envy them the profits and advantages arising from it. Even if it cannot be supported, no man ought to envy them the profits which they have received; because the world has undoubtedly derived great advantages from their ingenuity. We are called upon to deliver our opinions on the dry question of law, whether upon the case disclosed to us, this patent can or cannot be sustained. And I shall deliver my opinion first upon the case itself, and secondly on the arguments which have been urged at the bar.

*The case states the plaintiffs' patent, the specification, and the Act of Parliament. It gives a description of the old engine, and then states that the invention of the plaintiffs is a new and useful one, and that the specification is sufficient to enable a mechanic to construct fire-engines, producing the effect of lessening the consumption of fuel and steam in fire-engines, upon the principle invented by Mr. Watt. One objection made by the defendant was, that it did not appear on the case, that a mechanic could, from the specification, construct an engine which should lessen the consumption of fuel and steam, with equal effect, or to the same extent as Mr. Watt himself did. If the negative appeared, viz. that a mechanic could not from the specification make an engine with equal effect, or if it required expense and experiments before it could be done, I agree that either of those facts would avoid the patent. But that is not so stated; and upon this case I think we are bound to say there is no foundation for either of those objections. There is another objection to the case, which I think more important, and that is that the jury have not told us wherein the invention consists, whether it be in an additional cylinder, or other vessel to the old machine, or what the addition is, or whether it be only in the application of the old parts of the machine, or in what is called at the bar, the principle only, or in what that principle consists. These defects have opened a great field of argument, and have driven the plaintiffs' counsel to the necessity of endeavouring to support his case on all possible grounds. The old engine consisted of a cylinder, a boiler, a pipe which occasionally communicated between them, an injection cistern, and pumps. The two material parts of the new engine, as mentioned in the specification, are the old cylinder, now called the steam vessel, and the vessel now called the condenser, which it is said must be distinct from the steam vessel, though occasionally communicating with it. The old boiler did occasionally communicate with the cylinder. The pumps, grease and other things are admitted to be trifling circumstances, and not worthy any observation. Upon this state of the case, I cannot say that there is anything substantially new in the manufacture; and indeed it was expressly admitted on the argument, that there were no new

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particulars in the mechanism: that it was not a machine or instrument which the plaintiffs had invented: *that mechanism was not pretended to be invented in any of its parts: that this engine does consist of all the same parts as the old engine: and that the particular mechanism is not necessary to be considered. The fact of there being nothing new in the engine drove the counsel to argue on very wide grounds, and to touch on the possibility of maintaining a patent for an idea or a principle, though I think it was admitted that a patent could not be sustained for an idea or a principle alone.

The very statement of what a principle is, proves it not to be a ground for a patent. It is the first ground and rule for arts and sciences, or in other words the elements and rudiments of them. A patent must be for some new production from those elements, and not for the elements themselves. The plaintiffs' case is considerably distressed in many parts of it, and as it seems to me, the arguments which have been adduced were very much calculated to keep clear of difficulties, which the counsel foresaw might be introduced into the case; as first, that unless the principle can be supported as the ground of the patent, there may be some danger of confirming the defendant's objection to it: secondly, that unless the principle can be supported, it may open a fatal objection to the specification, because that does not state in what manner the new machine is to be constructed, how it varies from the old one, or in what way the improvements are to be added: or thirdly, because the patent embraces the whole principle, and is founded on that alone; but the invention is taken to consist of an improvement or addition only. Another objection may arise both to the patent and specification, viz. that the patent is granted for the whole engine, and not for the addition or improvement only. Perhaps it may be convenient and judicious to keep these objections as much as possible in the back-ground, and out of the view of the Court. But it is our duty to sift and dive into the facts and circumstances of the case, and the bearings and consequences of them, as far as our abilities or knowledge of the subject will admit. There is one short observation arising on this part of the case, which seems to me to be unanswerable, and that is, that if the principle

alone be the foundation of the patent, it cannot possibly stand, with that knowledge and discovery which the world were in possession of before. The effect, the power, and the operation of steam were known long before the date of this patent; *all machines which are worked by steam are worked on the same principle. The principle was known before, and therefore if the principle alone be the foundation of the patent, though the addition may be a great improvement, (as it certainly is), yet the patent must be void *ab initio*. But then it was said, that though an idea, or a principle alone would not support the patent, yet that an idea reduced into practice, or a practical application of a principle was a good foundation for a patent, and was the present case. The mere application or mode of using a thing was admitted in the reply not to be a sufficient ground; * for on the Court putting the question, whether if a man by science were to devise the means of making a double use of a thing known before, he could have a patent for that, it was rightly and candidly admitted that he could not. The method and the mode of doing a thing are the same: and I think it impossible to support a patent for a method only, without having carried it into effect and produced some new substance. But here it is necessary to inquire, what is meant by a principle reduced into practice. It can only mean a practice founded on principle, and that practice is the thing done or made, or in other words the manufacture which is invented.

This brings us to the true foundation of all patents, which must be the manufacture itself; and so says the statute 21 Jac. I. c. 3. All monopolies except those which are allowed by that statute, are declared to be illegal and void; they were so at common law, and the sixth section excepts only those of the sole working or making any manner of new manufacture: and whether the manufacture be with or without principle, produced by accident or by art, is immaterial. Unless this patent can be supported for the manufacture, it cannot be supported at all. I am of opinion that the patent is granted for the manufacture, and I agree with my brother *Adair* that verbal criticisms ought

* By an error of the press, this question and the admission in answer to it are omitted in the statement of the reply.

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not to avail, but that "principle" in the patent and "engine" in the Act of Parliament mean and are the same thing. Besides, the declaration is founded on a right to the engine, and therefore, unless the plaintiffs can make out their right to that extent, they must fail. In most of the instances of the different patents mentioned by my brother *Adair*, the patents were for the manufacture, and the specification rightly stated the method by which the manufacture was made: but none of them go the length of proving, that a method of doing a thing without the thing being done or actually reduced into practice, is a good foundation for a patent. When the thing is done or produced, then it becomes the manufacture which is the proper subject of a patent. Dollond's patent was for object-glasses, and the specification properly stated the method of making those glasses. And as I mentioned in the course of the argument, the point contested in that case was, whether Dollond or Hall was the first and true inventor within the meaning of the statute, Hall having first made the discovery in his own closet, but never made it public; and on that ground, Dollond's patent was confirmed. Mechanical and chemical discoveries all come within the description of manufactures: and it is no objection to either of them that the articles of which they are composed were known and were in use before, provided the compound article which is the object of the invention, is new. But then the patent must be for the specific compound, and not for all the articles or ingredients of which it is made. The first inventor of a fire-engine could never have supported a patent for the method and principle of using iron. Nor could Dr. James (supposing his patent had been clear of other objections) have sustained a patent for the method and principle of using antimony. In the first case, the patent must have been for the fire-engine *eo nomine;* and in the second, for the specific compound powder. Suppose the world were better informed than it is, how to prepare Dr. James's fever powder, and an ingenious physician should find out that it was a specific cure for a consumption, if given in particular quantities; could he have a patent for the sole use of James's powder in consumptions or to be given in particular quantities? I think it must be conceded that such a patent would be void; and yet the use of

the medicine would be new, and the effect of it as materially different from what is now known, as life is from death. So in the case of a late discovery, which as far as experience has hitherto gone, is said to have proved efficacious, that of the medicinal properties of arsenic in curing agues, could a patent be supported for the sole use of arsenic in aguish complaints? The medicine is the manufacture, and the only object of a patent, and as the medicine is not new, any patent for it, or for the use of it, would be void. The case of water tabbies which has often been mentioned in Westminster Hall, may afford some illustration of this subject. That invention first [488] owed its rise to the accident of a man's spitting on a floor-cloth, which changed its colour, from whence he reasoned on the effect of intermixing water with oils or colours, and found out how to make water tabbies, and had his patent for water tabbies only. But if he could have had a patent for the principle of intermixing water with oil or colours, no man could have had a patent for any distinct manufacture, produced on the same principle. Suppose painted floor-cloths to be produced on the same principle, yet as the floor-cloth and the tabby are distinct substances, calculated for distinct purposes, and were unknown to the world before, a patent for one would be no objection to a patent for another.

The true question in this case is, whether the plaintiffs' patent can be supported for the engine? I have already said I consider it as granted for the engine, and if that be the right construction of the patent, that alone lays all the arguments about ideas and principles out of the case. The objections to this patent, as a patent for the engine, are two: first, that the fire-engine was known before: and secondly, though the plaintiffs' invention consisted only of an improvement of the old machine he has taken the patent for the whole machine, and not for the improvement alone. As to the first, the fact which the plaintiffs' counsel were forced to admit, and did repeatedly admit in the terms which I mentioned, viz. that there was nothing new in the machine, is decisive against the patent. And the second objection is equally fatal. That a patent for an addition or improvement may be maintained, is a point which has never been

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directly decided; and *Bircot's* case, 3 Inst. 184, is an express authority against it, which case was decided in the Exchequer Chamber. What were the particular facts of that case we are not informed, and there seems to me to be more quaintness than solidity in the reason assigned, which is, that it was to put but a new button to an old coat, and it is much easier to add than to invent. If the button were new, I do not feel the weight of the objection that the coat on which the button was to be put, was old. But in truth arts and sciences at that period were at so low an ebb, in comparison with that point to which they have been since advanced, and the effect and utility of improvements so little known, that I do not think that case ought to preclude the question. In later times, whenever the point has arisen, the [489] inclination of the Court has been in favour of the patent for the improvement, and the parties have acquiesced, where the objection might have been brought directly before the Court. In *Morris* v. *Branson* which was tried at the sittings after Easter Term, 1776, the patent was for making oilet holes or net work in silk, thread, cotton, or worsted; and the defendant objected that it was not a new invention, it being only an addition to the old stocking frame. Lord MANSFIELD said "after one of the former trials on this patent, I received a very sensible letter from one of the gentlemen who was upon the jury, on the subject whether on principles of public policy, there could be a patent for an addition only. I paid great attention to it, and mentioned it to all the judges. If the general point of law, viz. that there can be no patent for an addition, be with the defendant, that is open upon the record, and he may move in arrest of judgment. But that objection would go to repeal almost every patent that was ever granted." There was a verdict for the plaintiffs with 500*l.* damages, and no motion was made in arrest of judgment. Though his Lordship did not mention what were the opinions of the judges, or give any direct opinion himself, yet we may safely collect that he thought on great consideration, the patent was good, and the defendant's counsel, though they had made the objection at the trial, did not afterwards persist in it. Since that time, it has been the generally received opinion in Westminster Hall, that a patent for an addition is good. But then it must be for the

addition only, and not for the old machine too. In *Jessop's* case, as quoted by my brother *Adair*, the patent was held to be void because it extended to the whole watch, and the invention was of a particular movement only. It was admitted in the reply, that the patent should be applied to the invention itself: but it was contended, that if in consequence the patent gave a right to the whole engine, that would be no objection. To this I answer, that if the patent be confined to the invention, it can give no right to the engine, or to any thing beyond the invention itself. Where a patent is taken for an improvement only, the public have a right to purchase that improvement by itself, without being incumbered with other things. A fire-engine of any considerable size, I take it, would cost about 1,200*l.* and suppose the alteration made by the plaintiff, with a fair allowance for profit would cost 50*l.* or 100*l.* is it to be maintained, that all the persons who [490] already have fire-engines must be at the expense of buying new ones from the plaintiffs, or be excluded from the use of the improvement? So in the case of the watch, may not other persons in the trade buy the new movement, and work it up in watches made by themselves? Where men have neither fire-engines nor watches, it is highly probable that they will go to the inventor of the last and best improvements for the whole machine; and if they do, it is an advantage which the inventor gets from the option of mankind, and not from any exclusive right or monopoly vested in him. But here the plaintiffs claim the right to the whole machine. To that extent their right cannot be sustained, and therefore I am of opinion that there ought to be judgment for the defendant.

LORD CHIEF JUSTICE EYRE:

Upon this case two questions are reserved for the opinion of the Court; the first, whether the patent is good in law, and continued by the Act of Parliament mentioned in the case; the second, whether the specification stated in the case is in point of law sufficient to support the patent? As I take it, the facts of the case are stated with a view to the application of them to these questions, and not to any other question which may be thought to arise upon them. Perhaps indeed, if the Court saw

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that another material question might arise out of these facts which had escaped the attention of the Court and jury at *Nisi Prius*, they might direct the case to be amended or a new trial to be had in order to introduce it. These two questions were thus stated in order to bring before the Court the points of law insisted on upon the part of the defendant, and also to give an opportunity for considering a doubt which occurred to me upon my first view of the case at the trial, which was, whether a patent right could attach upon any thing not organized, and capable of precise specification. As these two questions are framed, there are three points for the consideration of the Court. First, whether the patent was in its original creation good or bad? Secondly, taking it to be good, whether it was continued by the Act of Parliament? And thirdly, taking it to be good in its original creation, and to have been continued by the Act of Parliament, subject to an objection for the want of a specification, whether there has been a sufficient specification? Though [491] we have had many cases upon patents yet I think we are here upon ground which is yet untrodden, at least was untrodden till this cause was instituted, and till the discussions were entered into which we have heard at the bar, and now from the Court. Patent rights are nowhere that I can find accurately discussed in our books. Sir Edward Coke discourses largely, and sometimes not quite intelligibly, upon monopolies, in his chapter of monopolies, 3 Inst. 181. But he deals very much in generals, and says little or nothing of patent rights, as opposed to monopolies. He refers principally to his own report of the case of monopolies, 11 Co. 86 b; he also mentions a resolution of all the judges in 2 and 3 Eliz. from a MS. of Dyer, condemning a grant to the corporation of Southampton by Phillip and Mary, for the sole right of importing malmsey wine, and that no malmsey wine should be landed at any other place, upon pain to pay treble customs. He also mentions *Bircot's* case in the Exchequer Chamber, 15 Eliz. for a privilege concerning the preparing and melting of lead ore, but he states no particulars; and the principle on which that case was determined has been, as my brother BULLER observes, not adhered to; namely, that an addition to a manufacture cannot be the subject

of a patent. There is also a case in Godbolt,* and there are a few others condemning particular patents, which were beyond all doubt mere monopolies. The modern cases have chiefly turned upon the specifications, whether there was a fair disclosure. Such was the case of *Turner* v. *Winter*, 1 Term Rep. B. R. 602.† The case of *Edgeberry* v. *Stephens*, 2 Salk. 447, is almost the only case upon the patent right, under the saving of the statute of Jac. I. that is to be found. That case establishes, that the first introducer of an invention practised beyond sea, shall be deemed the first inventor: and it is there said, the Act intended to encourage new devices useful to the kingdom; and whether acquired by travel or study it is the same thing. Deriving so little assistance from our books, let us resort to the statute itself, 21 Jac. I. c. 3. We shall there find a monopoly defined to be "the privilege of the sole buying, selling, making, working or using any thing within this realm;" and this is generally condemned as contrary to the fundamental law of the land. But the 5th and 6th sections of that statute save letters patent, and grants of privileges of the sole working or making of any manner [492] of new manufacture within this realm, to the first and true inventor or inventors of such manufactures, with this qualification, "so they be not contrary to the law, nor mischievous to the state," in these three respects: first, "by raising the prices of commodities at home;" secondly, "by being hurtful to trade;" or, thirdly, by being "generally inconvenient." According to the letter of the statute, the saving goes only to the sole working and making; the sole buying, selling, and using, remain under the general prohibition; and with apparent good reason for so remaining, for the exclusive privilege of buying, selling, and using, could hardly be brought within the qualification of not being contrary to law, and mischievous to the state, in the respects which I have mentioned. I observe also, that according to the letter of the statute, the words "any manner of new manufacture" in the saving, fall very short of the words "any thing" in the first section. But most certainly the exposition of the statute, as far as usage will expound it, has gone very

* Godb. 252. *The Clothworkers of Ipswich's* case, *ib.* 413. *Lord Zouch and More's* case.

† 1 R. R. 311.

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much beyond the letter. In the case in Salkeld, the words "new devices" are substituted and used as synonymous with the words "new manufacture." It was admitted in the argument at the bar, that the word "manufacture" in the statute was of extensive signification, that it applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice. Let us pursue this admission. Under things made, we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects, for a new piece of mechanism is certainly a thing made. Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public. When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making, ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. Upon this ground Dollond's patent was perhaps exceptionable, for [493] that was for a method of producing a new object-glass, instead of being for the object-glass produced. If Dr. James's patent had been for his method of preparing his powders, instead of the powders themselves, that patent would have been exceptionable upon the same ground. When the effect produced is no substance or composition of things, the patent can only be for the mechanism if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced. To illustrate this. The effect produced by Mr. David Hartley's invention for securing buildings from fire is no substance or composition of things; it is a mere negative quality, the absence of fire. This effect is produced by a new method of disposing iron plates in buildings. In the nature of things the patent could not be for the effect produced. I think it could not be for the making of the plates of iron, which, when disposed in a particular

manner produced the effect, for those are things in common use. But the invention consisting in the method of disposing of those plates of iron, so as to produce their effect, and that effect being a useful and meritorious one, the patent seems to have been very properly granted to him for his method of securing buildings from fire. And this compendious analysis of new manufactures mentioned in the statute, satisfies my doubt, whether any thing could be the subject of a patent, but something organized and capable of precise specification. But for the more satisfactory solution of the other points which are made in this case, I shall pursue this subject a little further. In Mr. Hartley's method, plates of iron are the means which he employs; but he did not invent those means, the invention wholly consisted in the new manner of using, or I would rather say, of disposing a thing in common use, and which thing every man might make at his pleasure, and which therefore, I repeat, could not, in my judgment, be the subject of the patent. In the nature of things it must be, that in the carrying into execution any new invention, use must be made of certain means proper for the operation. Manual labour to a certain degree must always be employed; the tools of artists frequently; often things manufactured, but not newly invented, such as Hartley's iron plates; all the common utensils used in conducting any process, and so up to the most complicated machinery that the art of man ever devised. Now let the merit of the invention be what it may, it is evident [494] that the patent in almost all these cases cannot be granted for the means by which it acts, for in them there is nothing new, and in some of them nothing capable of appropriation. Even where the most complicated machinery is used, if the machinery itself is not newly invented, but only conducted by the skill of the inventor, so as to produce a new effect, the patent cannot be for the machinery. In Hartley's case it could not be for the effect produced, because the effect, as I have already observed, is merely negative, though it was meritorious. In the list of patents with which I have been furnished, there are several for new methods of manufacturing articles in common use, where the sole merit and the whole effect produced are the saving of time and expense, and thereby lowering the price of the article,

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and introducing it into more general use. Now I think these methods may be said to be new manufactures, in one of the common acceptations of the word, as we speak of the manufactory of glass, or any other thing of that kind. The advantages to the public from improvements of this kind, are beyond all calculation important to a commercial country, and the ingenuity of artists who turn their thoughts towards such improvements, is in itself deserving of encouragement; and in my apprehension it is strictly agreeable to the spirit and meaning of the statute Jac. I. that it should be encouraged: and yet the validity of these patents, in point of law, must rest upon the same foundation as that of Mr. Hartley. The patent cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing as to the question upon a patent, no new substance, but an old one, produced advantageously for the public. It cannot be for the mechanism, for there is no new mechanism employed. It must then be for the method; and I would say, in the very significant words of Lord MANSFIELD * in the great case of the copyright, it must be for method detached from all physical existence whatever. And I think we should well consider what we do in this case, that we may not shake the foundation upon which these patents stand. Probably I do not overrate it when I state that two-thirds, I believe I might say three-fourths, of all patents granted since the statute passed, are for methods of operating and of manufacturing, producing no new substances and employing no new machinery. If the list were [495] examined, I dare say there might be found fifty patents for methods of producing all the known salts, either the simple salt, or the old compounds. The different sorts of ashes used in manufactures are many of them inventions of great merit, many of them probably mere speculations of wild projectors: the latter ought to fall, the former to stand. If we wanted an illustration of the possible merit of a new method of operating with old machinery, we might look to the identical case now in judgment before the Court. If we consider into what general use fire-engines are come, that our mines cannot be worked without them, that they are essentially necessary to the carrying on

* 4 Burr. 2397.

many of our principal manufactures, that these engines are worked at an enormous expense in coals, which in some parts of the kingdom can with difficulty be procured at all in large quantities, it is most manifest that any method found out for lessening the consumption of steam in the engines, which by necessary consequence lessens the consumption of coals expended in working them, will be of great benefit to the public, as well as to the individual who thinks fit to adopt it. And shall it now be said, after we have been in the habit of seeing patents granted, in the immense number in which they have been granted for methods of using old machinery, to produce substances that were old, but in a more beneficial manner, and also for producing negative qualities by which benefits result to the public, by a narrow construction of the word "manufacture" in this statute, that there can be no patent for methods producing this new and salutary effect, connected, and intimately connected as it is, with the trade and manufactures of the country? This, I confess, I am not prepared to say. An improper use of the word "principle" in the specification set forth in this case has, I think, served to puzzle it. Undoubtedly there can be no patent for a mere principle, but for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, I think there may be a patent. Now this is, in my judgment, the thing for which the patent stated in the case was granted, and this is what the specification describes, though it miscalls it a principle. It is not that the patentee has conceived an abstract notion that the consumption of steam in fire-engines may be lessened, but [496] he has discovered a practical manner of doing it; and for that practical manner of doing it he has taken this patent. Surely this is a very different thing from taking a patent for a principle; it is not for a principle, but for a process. I have dwelt the more largely upon this part of the case because, in my apprehension, this is the foundation upon which the whole argument will be found to rest. If upon the true construction of the statute there may be a patent for a new method of manufacturing or conducting chemical processes, or of working machinery, so as to produce new and useful effects, then I am warranted to

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conclude that this patent was in its original creation good. I will next consider the specification, before I proceed to the consideration of the question arising upon the statute for continuing this patent. The specification has reference to the patent, and not to the statute, and therefore it will be proper to consider it in this stage of the argument. I distinctly admit that if this patent is to be taken to be a patent for a fire-engine, the specification is not sufficient; it is not a specification of mechanism of any determinate form, having component parts capable of precise arrangement, and of particular description. On the other hand, if the patent is not for a fire-engine, but in effect for a manner of working a fire-engine, so as to lessen the consumption of steam, which, as I conceive, the words of the patent import, let us see whether this specification does not sufficiently describe a manner of working fire-engines, so as to produce the effect expressed in the patent, and whether the only objection to the specification is not that it is loaded with a redundancy of superfluous matter. The substance of the invention is a discovery, that the condensing the steam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of steam-heat, will lessen the consumption of steam. This is no abstract principle, it is in its very statement clothed with practical application. It points out what is to be done in order to lessen the consumption of steam. Now the specification of such a discovery seems to consist in nothing more than saying to the constructer of a fire-engine, "for the future condense your steam out of the body of the cylinder, instead of condensing it within it, put something round the cylinder to protect it from the external air, and to preserve [497] the heat within it, and keep your piston air-tight without water." Any particular manner of doing this one should think would hardly need to be pointed out, for it can scarcely be supposed, that a workman capable of constructing a fire-engine would not be capable of making such additions to it as should be necessary to enable him to execute that which the specification requires him to do. But if a very stupid workman should want to know how to go about this improvement, and in answer to his question was directed to conduct the steam which was to be condensed

from the cylinder into a close vessel, by means of a pipe and a valve, communicating with the cylinder and the close vessel, to keep the close vessel in a state of coldness sufficient to produce condensation, and to extract from it any part of the steam which might not be condensed by the pump; and was also told to enclose the cylinder in a wooden case, and to use a resinous substance instead of water to keep the piston air-tight, can it be imagined that he would be so stupid as not to be able to execute this improvement, with the assistance of these plain directions? If any man could for a moment imagine that this was possible, I observe that this difficulty is put an end to, because the jury have found that a workman can execute this improvement in consequence of the specification. Some machinery it is true must be employed, but the machinery is not of the essence of the invention but incidental to it. The steam must pass from the cylinder to the condensing vessel, for which purpose there must be a valve to open a pipe to convey, and a vessel to receive the steam. But this cannot be called new invented machinery, whether considered in the parts or in the whole, and therefore there can be no patent for this addition to the fire-engines. Suppose a new invented chemical process, and the specification should direct that some particular chemical substance should be poured upon gold in a state of fusion, it would be necessary, in order to this operation, that the gold should be put into a crucible, and should be melted in that crucible, but it would be hardly necessary to state in the specification the manner in which, or the utensils with which the operation of putting gold into a state of fusion was to be performed. They are mere incidents with which every man acquainted with the subject is familiar. Some observations were made in the course of the argument at the bar, on its being left unascertained both in the specification and case, to what extent the consumption of steam [498] would be lessened by the invention; but the method does not profess to ascertain this: it professes to lessen the consumption; and to make the patent good, the method must be capable of lessening the consumption to such an extent as to make the invention useful. More precision is not necessary, and absolute precision is not practicable. The quantity of steam which will

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be saved in each machine must depend upon a great variety of circumstances respecting each individual fire-engine, such as the accuracy of casting or boring the cylinder, or the dimensions of it, the accuracy of the workman in putting his apparatus together, the care in keeping the cylinder in a proper degree of heat, and the more or less perfect order for working, in which the engine is kept. All these circumstances will affect the quantity of steam to be lessened. Some weighty observations have been made upon parts of this specification, but those parts appear to me not properly to relate to the method described in the patent; they are rather intimations of new projects of improvement in fire-engines, and some of them, I am very ready to confess, either very loosely described or not very accurately conceived. I do not undertake to pronounce which, but one or the other is pretty clear. They are the fourth and fifth articles: the first, second, third and sixth appear to me to belong to this method, and very clearly to point out and explain the method to every man who has a common acquaintance with the subject, and to be intelligible even to those who are unacquainted with it. If there be a specification to be found in that paper, which goes to the subject of the invention as described in the patent, I think the rest may very well be rejected as superfluous. If indeed the defendant could have shown that he had not pirated the invention which is sufficiently specified; but that what he hath done hath a reference to another method of lessening the consumption of steam to which the questionable parts of the specification were meant to relate, the objection to the specification would have remained, and perhaps some other objections which have been alluded to, might have been taken both to the patent and specification. But I would observe here, that with regard to this and some other difficulties, there is no question reserved in this case respecting the infringement of the patent. The general [499] fact only is stated; that it has been infringed by the defendant and in the consideration of a case reserved, we are not to search for difficulties upon which the parties have not proposed to state any point to us for our judgment, and into which I think we are not at liberty to go. The difficulty which struck me, as it did my brother BULLER, with respect to the declaration, is applied to

the patent as it originally stood, not as it now stands continued by the Act of Parliament. If we were at liberty to go into it, that difficulty might perhaps produce a nonsuit, and that nonsuit a new action in which the difficulty would be removed. But this cause was instituted to try the merits of the patent: I thought therefore that a formal objection was wisely overlooked. Supposing then the difficulty upon the patent itself and the specification to be got over, the Act of Parliament remains to be considered. The objection stated in the strongest manner would amount to this, that the Act continues a patent for a machine, when in fact the patent is for a process. It is to be observed that there is nothing technical in the composition or the language of an Act of Parliament. In the exposition of statutes the intent of Parliament is the guide. It is expressly laid down in our books, I do not here speak of penal statutes, that every statute ought to be expounded not according to the letter, but the intent. 2 Roll. Abr. 118; Plowd. 350, 363. This doctrine has been carried into effect by cases. Though a corporation be misnamed in an Act of Parliament, if it appears that the corporation was intended it is sufficient. 10 Co. 5 b. So the statute of *quia emptores terrarum* has said that every one shall hold of the lord paramount *secundum quantitatem terræ*, but this shall be construed to be *secundum valorem terræ;* for so was the intent. Plowd. 10, 57. We all know that an Act of Parliament may be extended by equity. No authority has been cited which amounts to proof that a mistake in point of description in an Act of Parliament of this nature when the true meaning can be discovered, and when there is a foundation on which the Act can be supported shall vitiate it. The case cited from Plowden differs essentially from this case. The Act of Parliament in that case gave effect to a supposed legal attainder, and proceeded upon it altogether. If the ground-work fell, and there was no legal attainder, nothing remained: the supposed attainder in that case fell, consequently all fell. Now the difference between that case and the present is this, here the true patent meant to be described exists, and may therefore be a groundwork to support the Act. This case was compared to the case of the King being deceived in his grant. But I am not satisfied that the King, proceeding by and with the

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advice of Parliament, is in that situation in respect of which he is under the special protection of the law, and that he could on that ground be considered as deceived in his grant: no case was cited to prove that position. The objection on the Act of Parliament is of the same nature as one of the objections to the specification; the specification calls a method of lessening the consumption of steam in fire-engines a principle, which it is not; the Act calls it an engine, which perhaps also it is not; but both the specification and statute are referable to the same thing, and when they are taken with their correlative are perfectly intelligible. Upon the wider ground I am therefore of opinion that the Act has continued this patent. A narrower ground was taken in the argument, which was to expound the word "engine" in the body of this Act, in opposition to the title of it, to mean a method; and I am ready to say I would resort to that ground if necessary in order to support the patent, *ut res magis valeat quàm pereat.* But it is not necessary: for let it be remembered, that though monopolies in the eye of the law are odious, the consideration of the privilege created by this patent is meritorious, because, to use the words of Lord Coke, "the inventor bringeth to and for the commonwealth a new manufacture by his invention, costs and charges." I conclude therefore that the judgment of the Court ought to be for the plaintiff.

The Court being thus equally divided, no judgment was given, but the parties seemed disposed to put the case upon the record in the form of a special verdict, in order that it might be carried on to a Court of Error.

[The second action (*Boulton* and *Watt* v. *Hornblower* and *Maberly*) was in all respects similar to the first, except that a general verdict was given for the plaintiffs, and judgment given in their favour by the Court of Common Pleas. But this was done without argument, owing to the Court having been equally divided in the former case. The defendants brought a writ of error; and, besides the general error, assigned for error that the invention for which the letters patent were granted is not an invention of any formed or organized machine, instrument or

manufacture, but of mere principles only, for which no letters patent could by law be granted.]

*This case was twice argued with great ability; the first time in Michaelmas Term last by *Gaselee*, for the plaintiffs in error, and *Holroyd* for the defendants; and now by *Le Blanc*, King's Serjt., for the former, and *Rous* for the latter. On behalf of the plaintiffs in error it was argued, 1st, That unless the patent could be established as for a formed machine, it could not be supported under the proviso of the stat. 21 Jac. I. c. 3, which is the only foundation of such a patent; 2ndly, That upon reading the patent in question, it could not be considered as a patent for such a machine; 3rdly, That the specification did not contain a sufficient description of a machine; and, 4thly, That the patent was taken for the whole, when it ought to have been for an addition only; the addition alone appearing in the specification to be of the plaintiff's invention.

But the COURT gave judgment in favour of the defendants in error.

LORD KENYON, Ch. J.:

It was rather from a deference to the very respectable opinions given in the Court of Common Pleas on the former occasion, than from any doubt we entertained on the subject, that a second argument was awarded here: but the case having been most ably argued, and every argument advanced at the bar that bears upon it, I wish to deliver my opinion now, to prevent any farther delay to the parties interested. I confess I am not one of those who greatly favour patents; for though, in many instances, and particularly in this, the public are benefited by them, yet on striking the balance upon this subject, I think that great oppression is practised on inferior mechanics by those who are more opulent. The principal objection made to this patent by the plaintiffs in error is, that it is a patent for a philosophical principle only, neither organized or capable of being organized; and if the objection were well founded in fact, it would be decisive: but I do not think that it is so. No technical words are necessary to explain the subject of a patent; as Lord HARDWICKE

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said upon another occasion, There is no magic in words. The questions here are, Whether by looking at the patent, explained as it is by the specification, *it does not appear to be a patent for a manufacture? and, Whether the specification is not sufficient to enable a mechanic to make the thing described? The jury have not indeed answered those questions in the affirmative in terms; but they have impliedly done so by finding a general verdict for the plaintiffs below. By comparing the patent and the manufacture together, it evidently appears that the patentee claims a monopoly for an engine or machine, composed of material parts, which are to produce the effect described; and that the mode of producing this is so described, as to enable mechanics to produce it. Having said thus much, it appears that the subject, as far as we have to treat of it, is exhausted. I have great respect for the contrary opinions that were given in the Common Pleas; and, probably, if I had been called upon on a sudden to determine this case, I should have been at a loss how to decide: but having now heard everything that can be said on the subject, I have no doubt in saying, that this is a patent for a manufacture, which I understand to be something made by the hands of man.

ASHHURST, J.:

Every new invention is of importance to the wealth and convenience of the public; and when they are enjoying the fruits of an useful discovery, it would be hard on the inventor to deprive him of his reward. In this case the jury have found, by their verdict, that all the allegations in the declaration were proved; one of which was, that the inventor had by his specification particularly described the nature of his invention, and the manner in which it was to be performed; and having thus complied with the terms of his patent, I think he is, in point of law as well as justice, entitled to the benefit which the patent and the Act of Parliament intended to confer on him.

GROSE, J.:

This is an action for violating that right supposed to have been given originally for 14 years by the patent in 1769; and

contended to be continued to James Watt, his representatives and assigns, for 25 years, by the statute in 1774. The statute recites the patent, the benefit of which is now determined by flux of time; and, therefore, the action can only be sustained on the continuance of that benefit to the patentee by the Legislature. The statute, however, expressly provides, that every objection in law competent against the patent, shall also be competent against the statute; that is, against the benefit to be derived to the patentee under the statute. The question then is, Whether the patent be good in law? in other words, Whether it be conformable to the statute of the *21 Jac. I. c. 3, s. 6, under which the plaintiff or any party can alone claim the privilege of a monopoly? The power thereby reserved to the King is, "That any declaration before mentioned, shall not extend to any letters patent and grants of privilege for the term of 14 years or under, thereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." The questions then upon this patent are, Whether it be a patent for the sole working or making of any manner of new manufacture? Whether the patentee were the first inventor? Whether it be contrary to law, mischievous to the state, or to trade, or generally inconvenient? By a proviso in the patent, the patentee is bound particularly to describe and ascertain the nature of his invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal; and to cause the same to be inrolled in the Court of Chancery. On which another question arises, namely, Whether the specification inrolled be sufficient? The aim of the Legislature is obvious. On the one hand, it was to encourage ingenious artificers and able and studious men to invent and bring forward for the use of the public new manufactures, the produce of their own ingenuity, by holding out to them the reward of the 14 years' monopoly; on the other hand, to secure to the public the benefit of the discovery, by causing to

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be inrolled a complete description of the thing to be done, and the manner of doing it, that others might be fully informed of it; and at the end of 14 years to be enabled to work or make the manufacture of which the patentee was the inventor. Upon some of the questions there seems to be no doubt: there is no doubt on this record coupled with the finding of the jury, that the patentee was the inventor of that which is stated in the declaration to be (by whatever name it may be called) an invention, method, principle, or manufacture. Neither is it contended, that the subject of the patent is "mischievous to the state, hurtful to trade, or generally inconvenient." On the contrary, every man's experience, as far as report goes, tells him that the invention has infinite merit, is for very many purposes highly [*8 T. R. 101] beneficial to the public, and is in great *request. As to the specification, I shall content myself with repeating what was said by one of the learned Judges of the Court of Common Pleas, that if the specification be such as will enable artists to adopt the invention, and make the manufacture, it is sufficient. It is averred in the declaration, that the patentee did, in pursuance of the proviso, particularly describe and ascertain the nature of the invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, in the Court of Chancery; that fact was necessary to be proved to entitle the plaintiffs to a verdict; and by the verdict which they obtained, I consider that fact as ascertained and concluded in their favour.

The important question is, Whether it be a patent "for the making or working of any manner of new manufacture?" It is argued by the plaintiffs in error, first, That it is a patent for a mere principle, and not for a new manufacture; and that nothing can be the object of a patent but a manufacture. 2ndly, That if it be a patent for a new manufacture, namely, the steam engine, it is not new, and that the patent should have been for the addition only, and not for the whole engine. As to the first of those propositions, that under the statute of James, there cannot be a patent for a mere principle, which this is contended to be, it is not necessary for me, in my way of considering the case, to form a decided opinion on that point; for if I can shew that this is a patent for a new manufacture, whether a patent for a mere

principle be good or not will be immaterial. Upon that point I shall only say, that having very much turned the question in my mind, and weighed and considered again and again the words of the statute specifying what patents the Crown may grant, upon which alone I conceive the question must ultimately depend, I am not prepared to say that a patent for a mere principle was intended to be comprehended within those words. It is, indeed, difficult to conceive that the Legislature, in giving power to the Crown to grant patents for the sole working or making of any manner of new manufacture, intended a power to grant patents for any other purpose than those expressly mentioned. But, as I said before, this is not material for me to determine, inasmuch as it seems to me, upon the best consideration, that this is not a patent for a mere principle, but for the working and making of a new manufacture within the words and meaning of the statute. I have been led to adopt this opinion by considering the words and description of the invention *in the patent, as referring to [*8 T. R. 102] and explained by the specification; and the specification itself as part of the patent. The ground on which I have felt myself at liberty so to do is this: The benefit to the public is from the specification disclosing to the world how others may make and use the same manufacture; without the specification the public have not that information; and by the condition of the letters patent, without the specification, the patentee is not entitled to his monopoly: providing, therefore, by the patent, that there must be a specification, and there being necessarily one in consequence of that proviso, I consider the patent and specification so connected together as to make a part of each other; and that to learn what the patent is, I may read the specification, and consider it as incorporated in the patent. Now the patent recites, that Mr. Watt had invented a method of lessening the consumption of steam and fuel in fire-engines; it grants to him the sole use and exercise of that invention, upon condition that he would disclose the nature of the invention, and in what manner the same was to be performed by an instrument inrolled. He does so, and that instrument describes the principles of the method, and the method by which those principles are to be carried into effect. The method is founded on the principle of keeping the

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steam vessel, the whole time the engine is at work, as hot as the steam that enters it: this is to be done by the manufacture of a case of wood, or some other material that transmits heat slowly, and by surrounding it with steam or other heated bodies, and suffering neither water nor any substance colder than steam to touch it. Secondly, he points out a mode of condensing the steam by vessels to be used distinct from the steam vessels at some times; at others they are to communicate with them, which he calls condensers; and these are new, at least not part of the old engine, and are to be kept as cold as the air in the neighbourhood of the engines. Thirdly, he gives directions as to drawing out the air not condensed by the cold of the condenser. Fourthly, he states how he means to employ steam to press on the piston in given cases. Fifthly, he directs how steam vessels should be formed, where rotatory motions, or motions round an axis, are required, namely, with weights and valves; and directs how in such case the steam vessels shall be supplied with steam, and how that which has done its office shall be discharged; and he also states a method by which the engine may be worked by the alternate expansion and contraction of the steam. This method, however, if not effected or accompanied by a manufacture, *I should hardly consider as within the statute of James But it seems to me that, in this specification, he does describe a new manufacture, by which his principle is realized; that is, by which his steam vessel is kept as hot as the steam during the time the engine is at work; by which means the consumption of steam and fuel is lessened. Thus he specifies the particular parts requisite to produce the effect intended, and states the manner how they are to be applied. He describes the case of wood in which the steam vessel is to be inclosed, the engines that are to be worked wholly or partially by condensation of steam, the vessels that he denominates condensers, and the steam vessels where rotatory motions are required. Can it then be said that the making and combining of these parts is not some manner of new manufacture? I cannot say that it is not. But if that had been doubtful, the verdict ascertains the fact. But then it is objected that the patent should have been for that manufacture; whereas it is for principles which the specification

[*8 T. R. 103]

describes. To which I answer, That the patent is not merely for principles, nor does the specification describe principles only. The patent states the principles on which the inventor proceeds, and shows in his specification the manufacture by means of which those principles are to take effect; which effect is to be the lessening of the consumption of steam and fuel by keeping the steam vessel of one uniform heat with the steam so long as the engine is worked.

Taking it however as a patent for an engine, it is objected: that the thing was made before, and that the patent should have been for the addition only, and not for the whole engine. But I do not consider it as a patent for the old engine, but only for the addition to or improvement of the old engine; and so the Act of Parliament considers it. The old engine consumed too much steam and fuel, and it was considered that by a case of wood, or of other material that would transmit heat slowly, surrounding it with steam by the use of condensers, and doing that which was not done in the old engine but is in this, the defects in the old engine might be corrected, and the new one by its additions made more useful. Experiments were tried, as appears by the Act of Parliament; and the purpose for which these additions were made is ultimately found to be completely attained by the methods pointed out in the specification. It possibly occurred to the inventor, that if the patent were to be obtained for the whole engine, it might be open to cavil, and therefore he took out his patent not for the engine, but for his *invention of a method [*8 T.R.104] of lessening the consumption of steam and fuel in fire engines. The method is disclosed in the specification, and it is by the addition of what is there disclosed, and by managing it in the way described. The patent therefore is only for that additional improvement as described in the specification; and there is no pretence to say that he claims or could claim the sole making of the old engine. But a doubt is entertained, Whether there can be a patent for an addition to an old manufacture? This doubt rests altogether upon *Bircott's* case, 3 Inst. 184; and if that were to be considered as law at this day, it would set aside many patents for very ingenious inventions, in cases where the additions to manufactures before existing are much more valuable than the

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original manufactures themselves. I shall content myself with referring to what Lord Chief Justice EYRE said in this cause in the Court of Common Pleas, in answer to this passage, and to the case of *Morris* v. *Branson*, cited by my brother BULLER upon the same point. If indeed a patent could not be granted for an addition, it would be depriving the public of one of the best benefits of the statute of James. Lord Coke's opinion therefore seems to have been formed without due consideration; and modern experience shews that it is not well founded. The statute 15 Geo. III. (I observe) secures to the patentee the privilege of constructing and selling "the engines" in words; on which account it has been objected that it falsely recites the patent, and therefore cannot operate in support of it; but the statute must have a reasonable construction, to support rather than defeat the intention of the Legislature and their grant; and by attending to every part of the statute, it is obvious that the engines secured to the patentee are such as are improved in the manner stated in the specification, and not the original fire engines; for the statute reciting the patent, recites it as a grant of the benefit and advantage of making and vending "certain engines by him invented for lessening the consumption of steam and fuel in fire engines." Now those were not the original fire engines but the improved ones; and those that were so improved, were the only ones invented for lessening the consumption of steam and fuel in fire engines; which shews that the Legislature considered the patent as a patent for the improvement of the engine described in the specification, and not as a patent for a mere method, or for the original fire engine. The subject is new to me, not affecting to be a mechanic; and I have had great [*8 T.R.105] difficulties in making up my mind upon it. I am *inclined, however, to think that a patent cannot be granted for a mere principle; but I think that, although in words the privilege granted is to exercise a method of making or doing any thing, yet if that thing is to be made or done by a manufacture, and the mode of making that manufacture is described, it then becomes in effect (by whatever name it may be called) not a patent for a mere principle, but for a manufacture for the thing so made, and not merely for the principle upon which it is made.

Where then is the mischief to the public, or how in this case is the intention of the Legislature defeated? They intended that, after 14 years, the public should from the specification be in possession of the manufacture and the art of making it; and that for those 14 years the patentee should have the monopoly of it as his reward. The patent is nothing without the specification; and the patentee can gain no advantage by it. It is also useless, unless the specification be such from which the public may gain information; therefore, whether the patent call the manufacture by its name, or style it an invention, a mode, a method, or in any other manner, it signifies nothing; for the specification describing the thing as required by the patent must be resorted to, and may fairly be deemed a part of the patent itself. If that be so, I read this patent, and find that it is for a method to be pursued according to the directions of the specification; and looking to the specification, I see that by pursuing the method pointed out, a manufacture is produced by the ingenuity of the inventor, and of which the public are to have the benefit. Then the intention of the Legislature is fulfilled; the public enjoy the fruits of the author's ingenuity, and the author gets the monopoly for a certain term. It signifies nothing to either whether the patent be for the engine so made, or for the method of making it, if that method be sufficiently described in the specification. Upon these grounds, with that deference which I ought to feel upon a subject with which I do not profess myself to be much conversant, my opinion is that the judgment of the Court of Common Pleas ought to be affirmed.

LAWRENCE, J.:

Two objections have been made by the plaintiffs in error; 1st, That this is not an invention for any formed or organized machine, instrument, or manufacture, but of mere principles only; 2ndly, That the specification is bad. As to the first, the claim of the plaintiffs below is founded on the proviso in the statute of James, which allows the Crown to grant patents in favour of new manufactures; and therefore it must *rest on the [*8 T. R. 106] ground of Watt's having invented some new manufacture. If it were necessary to consider whether or not mere abstract prin-

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ciples are the subject of a patent, I should feel great difficulty in deciding that they are: but that consideration is unnecessary on the present occasion, because by looking at the patent and the recital in the Act of Parliament, it appears that Watt applied for and obtained a patent for an engine or mechanical contrivance for lessening the consumption of steam in fire engines. The letters patent recite that he had invented a method of lessening the consumption of steam, and grant to him the sole right of using the said invention for 14 years. In order to see what the invention was, it is necessary to refer to the specification; that states what the invention is, and that the method consists in certain principles, as they are called, which are described in the specification. Then followed the statute, which, after reciting that the King had granted to Watt the sole benefit of making and vending certain engines invented by him for lessening the consumption of steam in fire engines, and that he had inrolled in the Court of Chancery a description of the said engine, vests in him the sole right of making and selling the said engines for 25 years. From this therefore it is clear that the Legislature understood that the patent was for an engine for some mechanical contrivance; and the form of the patent and the specification does not contradict this. "Engine" and "method" mean the same thing, and may be the subject of a patent. "Method," properly speaking, is only placing several things and performing several operations in the most convenient order: but it may signify a contrivance or device; so may an engine, and there I think it may answer the word "method." So "principle" may mean a mere elementary truth, but it may also mean constituent parts; and in effect the specification is this: "The contrivance by which I lessen the consumption of steam consists in the following principles, that is, constituent or elementary parts; a steam vessel, in which the powers of steam are to operate, to be kept as hot as the steam by a case; a distinct vessel to condense the steam; and pumps to draw off such vapour as is likely to impede the motion of the fire engine," &c. That is the description of the thing when put into different language.

Then, taking this to be a patent for an engine, it is objected: that the specification is bad. In considering that question, it is

necessary to see for what Mr. Watt has obtained his patent. He does not claim it for an improvement to a fire engine for any particular purpose, *e.g.* for raising water out of mines, or any other specific *thing; but his claim is generally to an invention for lessening the consumption of steam applicable to all fire engines, for whatever purpose they may be used, and whatever may be their construction, by an alteration of and addition to parts which are common to all, and upon which their powers of working depend. The objection that requires a more full description of the engine, goes the length of requiring the description of every engine that is acted upon and worked by the force of steam: but I do not think that, if his specification had been so comprehensive, his invention would have entitled him to a patent for the sole vending and making the whole engines so altered and improved; for such patent would have been more extensive than the thing invented. The patent must be supported as granted for an improvement and addition to old engines known and in use: and I think that the patent is good in this point of view: for Watt claims no right to the construction of engines for any determinate object, except that of lessening the consumption of steam and fuel in fire engines. His patent supposes the existence of such engines; and his contrivance, method or engine, is for lessening the consumption of fuel in such pre-existing engines, and for nothing else. In the argument, the engine to diminish the consumption of steam was confounded with that which it was intended to improve. Some of the difficulties in the case have arisen from considering the word engine in its popular sense, namely, some mechanical contrivance to effect that to which human strength, without such assistance, is unequal, but it may also signify device; and that Watt meant to use it in that sense,—and that the Legislature so understood it, is evident from the words "engine" and "method" being used as convertible terms. Now there is no doubt but that for such a contrivance a patent may be granted, as well as for a more complicated machine: it equally falls within the description of a manufacture; and unless such devices did fall within that description, no addition or improvement could be the subject of a patent. If this be so, it only remains to be considered,

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Whether or not, for the improvement of fire engines, Watt has, with sufficient accuracy, stated a definite alteration or addition which may be made in all fire engines, in such a way as to enable a workman to execute it? And it seems to me that he has; for he has directed him to make a vessel for the condensation, distinct from that in which the powers of steam operate; and to [*8 T. R. 108] convey the steam, as occasion requires, from the cylinder *to the condensing vessel; to keep the cylinder hot by means distinctly described, and to extract, by pumps, the vapour which may impede the work. Therefore it seems to me that he has given directions for the purpose: whether those directions were or were not sufficient, is not now a question for our decision; it was a question for the determination of the jury, and they have decided it.

Per CURIAM:

Judgment affirmed.

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May 6.
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(2 H. Bl. 504—509.)

A., at a foreign port, ships goods by the order and on the account of B., to be paid for at a future day, and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to B., who, before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to C. After the arrival † of the ship, and a delivery of part of the goods to the agent of C., B. becomes bankrupt without having paid A. the price of the goods. Under these circumstances, the delivery of the 800 bushels must be taken to be a delivery of the whole; so that the *transitus* is at an end independently of any question as to the effect of the indorsement of the bill of lading.

IN this action of trover for a quantity of wheat, a special verdict was found at Guildhall, which stated,

† *Note.*—It may be presumed that the ship had arrived, in the sense of being berthed at a discharging wharf. The *ratio decidendi* appears to be that the delivery of 800 bushels, together with the facts as to entry, &c., were evidence that the master of the ship had attorned, in the character of a warehouseman of the whole consignment, to the ultimate purchaser. And that therefore the effect of indorsement of the bill of lading as a *constructive* transfer of possession was immaterial. See the discussion of this case in *Ex parte Cooper, In re McLaren* (1879) 11 Ch. D. 68, 48 L. J. Bky. 48; and observations as to part delivery in *Kemp* v. *Falk* (1882) 7 App. Ca. 573, 586, 52 L. J. Ch. 167.—R. C.

That 7,061 bushels of wheat, the property of the plaintiffs, on the 23rd of January, 1793, at Baltimore in Maryland, were shipped by them on board a ship called the *Pomona*, by the order and for the account of George and Henry Browne, to be paid for by the said George and Henry Browne at a future day. That the defendant Heyward on the same day and year at Baltimore, being then the master of the said ship, signed five bills of lading, whereby he acknowledged the said 7,061 bushels of wheat to have been shipped on board the said ship, and undertook to deliver the same at the port of Cork, or a market to the said George and Henry Browne, or their assigns. That one of the said bills of lading, afterwards and before the arrival of the said ship and cargo at Waterford hereafter mentioned, was transmitted by the said plaintiffs to the said George and Henry Browne, and the said George and Henry Browne afterwards on the 7th of March, 1793, sold the said 7,061 bushels of wheat to Claude Scott, and thereupon indorsed the said bill, thereby ordering and directing the master of the said ship to deliver the said 7,061 bushels of wheat to the said Claude Scott or his assigns, and delivered the same bill of lading so indorsed to the said Claude Scott, together with an invoice of the cargo of the said ship, and at the same time drew four bills of exchange on the said Claude Scott payable three months after date, for several sums of money, mentioned in the said bills of exchange, the amount of, and as and for the [505] price of the said wheat, which said bills of exchange the said Claude Scott accepted and duly paid. That the said Claude Scott afterwards, and before the arrival of the said ship and cargo at Falmouth after-mentioned, indorsed and delivered the same bill of lading to the two other defendants the Foxes, thereby ordering and directing the master of the said ship to deliver the said 7,061 bushels of wheat to those defendants, with an intent that they, as the agents of the said Claude Scott, should and might on his account receive and take possession of the said 7,061 bushels of wheat. That the said ship with the said wheat on board, soon after the making the said bill of lading, sailed from Baltimore, and on the 5th of March, 1793, arrived at the port of Waterford in Ireland, the course of the ship towards Cork having been changed on account of her having been chased by a French

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privateer; and that the said ship with the said wheat on board afterward proceeded from Waterford to Falmouth, by the orders of the said George and Henry Browne, given by them to the said defendant Heyward in that behalf, at the request of the said Claude Scott, and arrived at Falmouth on the 3rd of April, 1793. That on the 4th of April in the same year, at Falmouth the defendant Heyward reported the said ship at the custom-house there, and made oath that the said wheat was for the said other defendants the Foxes, and the Foxes on the 5th of April in the same year, made entry of the said wheat at the custom-house at Falmouth in their names as agents of the said Claude Scott. That 800 bushels of the said wheat were taken out of the said ship, by the defendants the Foxes, and received and taken into their possession as such agents of the said Claude Scott, and for his account, between the 3rd and 8th of April. That the said George and Henry Browne on the 5th of April, 1793, became bankrupts, and that they had not at that time, nor at any time since paid the plaintiffs for the said wheat, and that the said plaintiffs on the 8th of April, 1793, gave notice to the defendant Heyward not to deliver the residue of the said wheat to the other defendants the Foxes, and requested the said Heyward to deliver the residue of the said wheat to them the plaintiffs, and offered to pay him the freight and all other charges due on account of the said cargo, but the said Heyward would not deliver the said [506] residue of the said wheat to the said plaintiffs, and afterwards, and before the commencement of this action, delivered the same to the said other defendants, who had converted and disposed thereof to the use of the said Claude Scott. But whether, &c.

On behalf of the plaintiffs, *Le Blanc*, Serjt. argued in the following manner:

The only question appears to be, whether there be any thing in the finding of the jury, which distinguishes this case from that of *Lickbarrow* v. *Mason*.* That case having been so recently and so fully discussed, it is not now necessary to agitate the question how far a bill of lading is a negotiable instrument; it is sufficient for the plaintiffs that they appear upon the face of

* 1 R. R. 357.

the special verdict entitled to maintain the action. The contract was between the shippers of the goods and the master of the vessel. Suppose the shippers had, before the sailing of the ship, required the master to unload, and give back the cargo to them, could the master have refused, and given at his election a right to another person to receive it? If he could not, neither could he legally deliver the wheat in the present instance to the Foxes, after having had notice from the shippers not to deliver it; he was therefore a wrong-doer, and guilty of a conversion. The cargo is found to have been the property of the plaintiffs, to be paid for at a future day by the consignees or their assigns, and before the delivery, (for it cannot be contended that a delivery of part of a divisible cargo was a delivery of the whole,) the consignees became bankrupts. The case therefore, at least as far as it relates to the residue of the goods undelivered, comes immediately within the authority of *Lickbarrow* v. *Mason*, which as it was decided in the Exchequer Chamber, affirms the right of stopping goods *in transitu;* and that decision was not overset in the House of Lords, where the case went off upon a *venire de novo*, leaving the material points undetermined. The only difference between the cases is this, that in *Lickbarrow* v. *Mason* the action was brought by the indorsees of the bill of lading against the assignees of the consignees, but in the present case by the owners against the indorsees.

Marshall, Serjt. *contrà*, stated four questions which he meant to argue. 1. What right passes by the indorsement of a bill of lading? 2. Whether the consignor, after the indorsement of the bill of lading for a valuable consideration, may stop the goods *in transitu?* 3. What shall be deemed an end of the [507] *transitus?* 4. Whether, when part of the goods have been delivered to the indorsee of the bill of lading, the master of the ship is justified in delivering the residue, after notice from the consignor not to deliver it? But the Court desired him to confine himself to the two last questions, the case of *Lickbarrow* v. *Mason* having, in the different stages of it, exhausted all argument on the two first. *Marshall* accordingly began by laying down this proposition, viz. that the *transitus* was at an

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end before the notice was given by the plaintiffs to the master of the ship not to deliver the goods to the agents of Scott. There must be some period of time when the *transitus* is ended, and that period is when the goods are absolutely or constructively come to the possession of the consignee. Here it is stated that the ship arrived at Falmouth on the 3rd of April, 1793, that on the 4th the master reported her at the Custom-house, and there made oath that the wheat was for George and Robert Fox; that on the 5th he entered it in their names as agents of Scott, and that between the 3rd and the 8th of that month 800 bushels were taken out of the ship, and received into their possession. Now before any part of the cargo could have been carried out of the ship, the whole must have been delivered on board to the agents of Scott: when bulk is once broken, and any part delivered, it is a delivery of the whole to the consignee, who thereby acquires a constructive possession of the whole. Suppose after this any part of the wheat had been stolen from the ship, the indictment must have laid it as the property of Scott. Suppose any damage done to it, or any part of it taken away, who must have brought the action? The master could not, for he had sworn it to be the property of Scott's agents; the consignors could not, for the master their agent had pronounced it to be the property of others. Suppose the duties unpaid, to whom would Government have resorted? Surely to the persons whom the master had declared on oath to be the owners. In *Blakey* v. *Dimsdale*, Cowp. 661, the Court held, that if goods are bought by sample to be delivered at a future day, and earnest paid, a delivery to the vendor's servant to carry to the vendee is a delivery to the vendee, and vests the property in him, and that the unloading part of the goods is an actual and not merely a constructive delivery.

The last question is whether the master of the ship was not justified in delivering the 800 bushels to the agents of Scott, [508] and whether Scott by the possession thus obtained did not acquire a perfect title? Little more is necessary for the decision of this question than to examine the form of the bill of lading, which is an acknowledgment by the master that he has

received the goods on board, to be delivered according to the consignment, and concluding that any one being accomplished, the others shall be void. Now when the master has delivered the goods according to the tenor and directions of any one of the bills, he has performed his contract, and the rest of the bills are void. But it is stated in the special verdict, that the plaintiffs on the 8th of April gave notice to the master not to deliver the residue of the wheat to the agents of Scott, and requested him to deliver it to them, and tendered the freight and other charges. But such a notice could not authorize the master to depart from his solemn contract to deliver the goods to the consignee or his assigns. Even if another bill of lading had been presented to him, instead of the notice on the 8th of April, when part of the cargo had been delivered, he would have had his option which of them he should accomplish. This appears from the evidence of the merchants in *Fearon* v. *Bowers*,* who agreed, "that where there are several bills of lading, the captain may deliver the goods to whom he thinks proper;" and from the direction of Lord Chief Justice LEE, who told the jury, "that the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do, was to deliver the goods upon one of the bills of lading," and therefore directed them to find for the defendant. If then the master were justified in delivering the residue of the goods to the agents of Scott, after the notice from the plaintiffs, Scott acquired a legal possession as well as a legal title: and it was admitted at the trial, and it is to be inferred from the special verdict, that he had a right to retain all that was legally delivered to him. Supposing therefore that the goods might have been stopped *in transitu*, the *transitus* was at an end; all the cargo was, if not actually, at least constructively in the possession of Scott, and he having fairly obtained that possession, his title was complete.

Le Blanc, Serjt. in reply:

In all the cases that have occurred respecting the right of stopping *in transitu*, the question has arisen after the arrival

* 1 H. Bl. p. 364.

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of the ship in port, the *transitus* therefore cannot be ended by that event, nor indeed by any thing short of an actual delivery of the goods. In the case of *Blakey* v. *Dimsdale*, the question was not as to the right of stopping the goods *in transitu*, but whether trespass could be maintained by the vendee after earnest paid and delivery. That case therefore cannot affect the present. A lien, though it originated in equity, is now considered as a legal right, and consequently a court of law will entertain a suit to enforce it. And that right could not be taken away by an entry at the Custom-house in the name of the consignee.

The COURT (after some conversation upon the case of *Lickbarrow* v. *Mason*, which not being material to the point in question, it is not necessary to repeat,) were of opinion that under the circumstances of this particular case the action could not be maintained, for the *transitus* was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to or at the time of the delivery, to separate part of the cargo from the rest.

Judgment for the defendants.

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May 18.
[509]

SAUNDERSON AND OTHERS *v.* JUDGE.

(2 H. Bl. 509—511.)

A. makes a promissory note payable to B. or order, with a memorandum upon it that it will be paid at the house of C., who is A.'s banker; in the course of business the note is indorsed to C. In an action by C. against the indorser, it is not necessary to prove an actual demand on A.

If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker.*

The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser.

THIS was an action on a promissory note, made by Sharp to Wilkinson or order, who indorsed it to Judge, he to Sanders & Co., and Sanders & Co. to Saunderson & Co. bankers in Southwark, to cover acceptances which they had given on

* The law of this case is, in effect, adopted by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 87 (3).—R. C.

account of Sanders & Co. At the foot of the note there was a memorandum by Sharp, that he would pay it at the house of Saunderson & Co. with whom he had a cash account. Some time before the note became due, Sharp had absconded, and on the day when it was due, Saunderson & Co. wrote by the post to Judge, giving him notice of the non-payment, and demanding payment of him, but there was no other evidence of the notice, than the putting the letter into the post-office. They had made no previous demand on Sharp, not knowing where to find him, [510] having directed several letters to him at his usual place of abode, which were returned with the post-mark upon them denoting that no such person was to be found, and believing him to be insolvent, as he had kept an account with them, but had then no effects in their hands. The declaration was in the usual form by the indorsee against the indorser of a promissory note, without stating that it was to be paid at the house of Saunderson & Co. At the trial the plaintiffs were nonsuited on the ground that it was incumbent on them to prove an actual demand on the maker of the note. There was also a doubt raised as to the consideration, but nothing turned upon it.

A rule having been granted to shew cause why there should not be a new trial, *Le Blanc*, Serjt. shewed cause, contending that the nonsuit was proper; first, because the note was not presented to Sharp for payment by the plaintiffs, and therefore the averment in the declaration that it was so presented, was not proved; and secondly, because it was not proved that the defendant received the letter which was put into the post-office, advising him of the non-payment by Sharp.

Bond, Serjt. in favour of the rule, said that as by the terms of the note the money was to be paid at the house of Saunderson & Co. it was there that it was to be presented for payment. If Judge, instead of indorsing the note to Saunderson & Co., had there demanded payment of it himself, it would have been sufficient; but as it was indorsed to Saunderson & Co., they could not make a demand upon themselves, and Sharp was nowhere to be found. As to the proof of the averment in the declaration, that the note was presented to Sharp for payment;

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in all actions on bills of exchange and promissory notes, due diligence used by the holder to obtain payment from the acceptor of the one, and the maker of the other, is evidence to support the averment. With respect to the other objection, the putting the letter to Judge into the post-office the day when the note became due, was clearly evidence of notice to him.

Per CURIAM:

It was no part of the contract in this case, that the note should be paid at the house of Saunderson & Co., and therefore that was not necessary to be stated in the declaration. But the maker merely appointed the house of his banker, as the place where he was to be called upon for payment, and where it would [511] be paid. Yet this was both an undertaking that there should be cash there, and also an order to the bankers to pay it. It is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker of the note; and it is the same thing in effect, if it be made at the place where he appoints it to be made. If Judge had been the holder of the note, it would have been enough for him to have presented it for payment at the house of Saunderson & Co. And as they at whose house it was to be paid were themselves the holders of it, it was a sufficient demand for them to turn to their books, and see the maker's account with them, and a sufficient refusal, to find that he had no effects in their hands. As to the notice to the defendant, the sending the letter by the post was sufficient evidence of that notice.

Rule absolute.

1795.
May 18,
[511]

KEANE *v.* BOYCOTT.

(2 H. BL. 511—516.)

A contract by an infant is voidable and not void, and where the contract may be for his benefit a third person cannot excuse his own tortious act towards the other contracting party by alleging that the contract is void.*

THIS was an action on the case, for enticing the plaintiff's servant to leave his service.

* The general principle that an infant's contract is only voidable is confirmed by *Williams* v. *Moore* (1843) 11 W. & M. 256. Contracts for money lent, &c. are now absolutely void by statute, 37 & 38 Vict. c. 62.—R. C.

[The only point of general interest, is dealt with by the observations in the judgment as to contracts by infants—whether voidable or void—and as to the rights and duties of third parties arising from such a contract.]

LORD CHIEF JUSTICE EYRE: [513]

In this case we were all agreed on the first question, that there was evidence of enticing the servant sufficient to go to the jury. But the question whether the allegation in the declaration, that the servant had contracted to serve the master for a term of years then to come and unexpired, was proved, was more difficult. The servant had in fact executed indentures, by which he contracted to serve the master for five years. But he was both an infant and a slave of his master at the time when he entered into the contract: he was very young and entirely in the power of the master. From these circumstances doubts arose whether the contract would bind him, and if it would not bind him, whether it would avail anything as against the defendant. My brother HEATH brought this question into the right train, by suggesting that the effect of this contract, by analogy to the law between lord and villein, might be to emancipate the slave, and therefore that it was for the benefit of the infant, which might remove the objection of infancy and slavery. This leads to the [514] consideration of what contracts may be entered into by infants, whether they can contract by deed, whether their contracts are void or only voidable, and if only voidable, who shall take advantage of the infancy to avoid them. In Litt. sect. 259, it is said, "If before such age (*i.e.* 21,) any deed or feoffment, grant, release, confirmation, obligation, or other writing be made by any of them &c., or if any within such age be bailiff or receiver to any, &c., all serves for nothing, and may be avoided." But this is certainly not correct, and Lord Coke's observation on it is, "Here by this, &c. are implied some exceptions out of this generality; as an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation, or other writing with a penalty for the

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payment of any of these, that obligation shall not bind him." And in Cro. Eliz. 920, it was holden, that an obligation from an infant for his necessary meat and drink, in the very sum disbursed on that account, was good, but not in double the sum, The conclusion is, that for those things which the Court can pronounce to be necessary for the infant, he may bind himself even by deed. If this question were between the master and the servant himself, the Court would hardly hesitate to say, that a contract to serve for five years having the effect of emancipation from slavery, was a contract for necessaries, in the enlarged sense of the word, as extending to all the cases enumerated in Co. Litt. But it is not necessary to go the whole length of that proposition, as this is not a case between the master and the servant.

[515] We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void, namely, such as the Court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not. In Rol. Abr. tit. Enfants,* and Com. Dig. † under the same title, instances are put of the three different kinds of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule, that the infant cannot plead *non est factum*, but must plead his infancy: it is his deed, but this is a mode of disaffirming it. He indeed states the rule generally, but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts. Upon the distinction between those two species of contracts, we certainly are not warranted to decide, that a contract which may have the effect of emancipation, and which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. For this is the case of a stranger and a wrong-doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is

* 1 Rol. Abr. 728.

† 3 Com. Dig. 619, 8vo. See also 3 Burr. 1794, *Zouch* v. *Parsons*.

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personal to the infant, and which no one can exercise for him. Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee, should the tenant be permitted to object the infancy of the feoffor? In *Whittingham's* case, 8 Co. 42 b, it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation.

The defendant in this case had no concern in the relation between the plaintiff and his servant; he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings would have [516] been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial.

Rule discharged.

C. P. TRINITY TERM.

DOVASTON *v.* PAYNE.

(2 H. Bl. 527—531.)

1795. *Jan.* 10.

[527]

A plea in bar of an avowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must show that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped.*

REPLEVIN for taking the cattle of the plaintiff. Avowry, that the defendant was seised in fee of the *locus in quo*, and took the

* *Vide* 2 Saund. 206 a; 284 e.

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cattle damage-feasant. Plea, that the *locus in quo* "lay contiguous and next adjoining to a certain common and public king's highway, and that the defendant and all other owners, tenants and occupiers of the said place in which &c. with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the [528] hedges and fences between the said place in which, &c. and the said highway, when and so often as need or occasion hath been or required, or shall or may be required to prevent cattle being in the said highway, from erring and escaping thereout into the said place in which, &c. through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c. and the said highway, before and at the time when, &c. were ruinous, broken down, prostrated and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned just before the said time when, &c. being in the said highway erred and escaped thereout, into the said place in which, &c. through the defects and defaults, &c." To this plea there was a special demurrer, "For that it is not shewn in or by the said plea, that the said cattle before the said time when, &c. when they escaped out of the said highway into the said place in which, &c. were passing through and along the said highway, nor that they had any right to be there at all, &c."

In support of the demurrer *Williams*, Serjt. argued as follows:

It is a rule in pleading, that if the defendant admits the fact complained of he must shew some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the plaintiff's fences, the defendant must have shewn that he had an interest in that close, or a licence from the owner to put his cattle there, Dyer 365 a, *Sir F. Leke's* case; recognized Hob. 104, *Digby* v. *Fitzherbert*, for a man is bound to repair against those who have

right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must shew they were lawfully using the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the being there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do any thing but merely pass and repass, Bro. Abr. Tresp. pl. 321. And according to this principle the entries state in pleas of this kind, that the cattle were *super viam prædictam transeuntes*, Thomps. Entr. 296, 397, and in Herne's Plead. 822, that they were "driven along the highway."

Heywood, Serjt. *contrà*: [529]

The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the plaintiff pleads the plea, and it is sufficient for him to shew that his cattle were wrongfully taken. The passing on the highway is as uncertain as the being there, and as little traversable. But the material issues on the record would be whether the fences were out of repair, and whether the defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

LORD CHIEF JUSTICE EYRE:

I agree with my brother *Williams* as to the general law, that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must shew that he was lawfully using the easement when the cattle so escaped.* This therefore reduces the case to a single point, namely, whether it does not appear on the plea, to a common intent, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "being in the said highway." This is a different case from cattle escaping from a close, where it is necessary to shew that the owner had a right to put them there, because a

* *Vide Anon.* 3 Wils. 126.

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DOVASTON v. PAYNE.

highway being for the use of the public, cattle may be in the highway of common right; I doubt therefore whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing, and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed, and if the being in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my brother *Williams*.

BULLER, J.:

This is so plain a case, that it is difficult to make it a ground of argument. But my brother *Heywood* says, there is a difference between trespass and replevin in the rules of pleading. [530] In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ, is that if trespass be brought for taking cattle which were distrained damage-feasant, it is sufficient for the defendant to say that he was possessed of the close, and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass, and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shewn. This brings me to the question whether the plea on this record be good to a common intent. Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke* to be of three sorts, viz. certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice ASTON treat

* Co. Litt. 303.

these distinctions as a jargon of words, without meaning. They have however long been made, and ought not altogether to be departed from. Concerning the two last kinds of certainty, it is not necessary to say any thing at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels.* By a common intent I understand that when words are used, which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail: it is simply a rule of construction, and not of addition: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable, for the question whether the plaintiff was a trespasser or not, depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point therefore is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal. [531]

HEATH, J.:

The law is as my brother *Williams* stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must shew an interest or a right to put them there. If it be a way, he must shew that he was lawfully using the way: for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J. of the same opinion.

Judgment for the defendant.

* Co. Litt. 303.

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June 22.

[531]

SAVILE *v.* JARDINE.

(2 H. Bl. 531—532.)

The simply saying to another "you are a swindler," is not actionable. Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40*s*. he is entitled to full costs.

In this action for words, the declaration contained five counts. The first, second and fourth were for words spoken of the plaintiff in his trade or business as an auctioneer, and were clearly actionable. The third and fifth counts without any *colloquium* of the plaintiff's trade stated the words to be, "You are a swindler," and special damage was laid by reason of the speaking, which said several words in the declaration, &c. Plea general issue. Verdict for the plaintiff on the whole declaration with one shilling damages.

A rule having been granted to shew cause why the prothonotary should not tax the plaintiff his full costs, though the damages were under 40*s*. *Adair*, Serjt. shewed cause, insisting that if the words in any one count were in themselves actionable, and the damages were under 40*s*., the plaintiff was entitled to no more costs than damages, according to the stat. 21 Jac. I. c. 16, s. 6, nor would the addition of special damage vary the case, 2 Black. 1062, *Collier* v. *Gaillard*. Besides, to call a man a swindler, is actionable.

Clayton, Serjt. in favour of the rule, argued that to call another a swindler was not actionable. The word swindler has no definite meaning. In common acceptance it only imports
[532] cheating, dishonesty, or fraud. It is indeed libellous if written and published, *l'Anson* v. *Stuart*, 1 Term Rep. B. R. 748. But many words are libellous if written that are not actionable if spoken, such for instance as those which tend to make a man ridiculous, or to cause him to be avoided in society as having a noisome disease, 2 Wils. 403, *Villers* v. *Monsley*. To say to a man "you are a swindler" is no more than saying "you are a

cheat, or a dishonest person," and those words, not applied to an office or trade, are not actionable, 2 Salk. 694, *Tamlin* v. *Hamlin;* 1 Show. 181, S. C. 2 Saund. 307, *Todd* v. *Hastings;* Stra. 1169, *Davis* v. *Miller*. The verdict being general, some damages must be intended to be given on each count, and as the words in the third and fifth counts are not actionable, the damages in respect of those counts were given for the special damage.

LORD CHIEF JUSTICE EYRE:

If the word swindler be not actionable, my brother *Clayton* has established his point. I think it only equivalent to cheat; it cannot be carried farther, and that is not actionable. I cannot well account for the decisions that the calling a man a thief is actionable, but the calling him a cheat is not so, unless it be that thief always implies felony, but cheat not always.

BULLER, J.:

The word cheat has always been holden not to be actionable and swindler means no more; when a man is said to be swindled, it means tricked or outwitted.

HEATH, J. and ROOKE, J. of the same opinion.

Rule absolute.

C. P. MICHAELMAS TERM.

D'EGUINO *v.* BEWICKE.

(2 H. Bl. 551—553.)

1795. *Nov.* 7.

[551]

A policy of insurance is effected on a ship, on a voyage from A. to C. warranted to depart with convoy for the voyage. The convoy appointed is to B., a port in the course and near to C. This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from B. to C. The term convoy, in a policy, means such a convoy as shall be appointed by Government.

THIS was an action on a policy of insurance, the facts of which were the following:—The policy was effected September 10th,

1795.

D'EGUINO v. BEWICKE.

1793, on goods on board the ship *Little Betsey*, on a voyage at and from London to St. Sebastian in Spain, warranted to depart with convoy for the voyage. No convoy was appointed directly to St. Sebastian, but on the 7th of November the ship sailed from Spithead, under convoy of a squadron of frigates, the commander of which had orders from the Admiralty, "to take with him the *Dido* frigate and *Weazle* sloop of war, and proceed to Gibraltar, and to take with him the trade bound to Gibraltar, and also such ships as should be at Spithead bound to Bilboa, and to detach the *Weazle* with the latter, with orders to see them safe to Bilboa, and after so doing, to return to England taking under his convoy such vessels as he should find at Bilboa bound for England." On the 29th of November the commodore made a signal for the *Weazle* to part company, and take with her such [552] ships as were bound to Bilboa and St. Sebastian, the captain of the *Weazle* having had previous instructions from the commodore "to take, when the signal to part company should be made, the vessels bound to Bilboa and St. Sebastian under his convoy, and see them in safety off Bilboa, there to inquire if there were any vessels bound to England, and to take any such under his convoy to Spithead." The *Weazle* accordingly left the rest of the fleet, taking the *Little Betsey* and other ships under convoy for Bilboa and Sebastian, but soon after parted from them in chase of a strange ship, and did not afterwards join them. The *Little Betsey* arrived in safety off Bilboa, which was in her course to St. Sebastian, but was taken by the French in her passage between the former port and the latter.

At the trial, it was objected that the warranty had not been complied with, the convoy being only to Bilboa; but the LORD CHIEF JUSTICE left it to the jury to determine whether there was not a sufficient convoy within the meaning of the policy, and a verdict was found for the plaintiff.

A new trial was now moved for by *Le Blanc*, Serjt. who contended that warranties were to be strictly construed, that there was a non-compliance with the warranty in this case, and the plaintiff was therefore not entitled to recover: that however

near the port of St. Sebastian might be to Bilboa,* the principle was the same, and a convoy to Bilboa could no more be construed to be a convoy to St. Sebastian, than a convoy to the Cape of Good Hope would be a convoy to the East Indies: and he cited the case of *Hibbert* v. *Pigou*, Parke's Insurance, 339.

BULLER, J.:

The case of *Hibbert* v. *Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from Jamaica to England. As to my brother *Le Blanc's* instance of a convoy to the Cape of Good Hope, I entirely differ from him in that point, for if Government thought a convoy to the Cape was a sufficient protection to the East India trade, and the usage were for the East India ships to sail with a convoy only to the Cape, and to consider that as the East India convoy, and no other convoy was appointed to the East Indies, I should hold that the warranty was complied with; though I agree, that if there were another convoy to the East Indies, it would be otherwise. The captain [553] of a merchant ship has nothing to do with, nor can he know the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion.

HEATH, J. of the same opinion:

The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys.

ROOKE, J.:

The ground stated by my brother *Le Blanc* seems to me to be more fit for the jury than the Court, and the jury have found that the convoy was sufficient.

LORD CH. J. EYRE:

I am satisfied with the finding of the jury.

Rule refused.

* From the nearness of St. Sebastian to Bilboa, it seems that if the *Weazle* had continued in company with the convoy, she would have afforded protection to ships going to both ports.

1795.
Nov. 21.

[559]

TURNER AND ANOTHER *v.* BAYNES.

(2 H. Bl. 559—560.)

Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate successors of the defendant.*

ASSUMPSIT by the churchwardens of the parish of Stow Market in Suffolk, against a former churchwarden. The usage of the parish had been, for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the plaintiffs were chosen by the parishioners at Easter, 1794, and continued in office until Easter, 1795; during which time, viz. in Hilary Term, 1795, the action was brought against the defendant, who had been churchwarden from Easter, 1790, to Easter, 1791, and who had admitted a sum of money to be in his hands, on the balance of his accounts at Easter, 1791, when he went out of office.

The first count of the declaration was, for money had and received to the use of the plaintiffs as churchwardens, and the promise to them as churchwardens. The second for money had and received to the use of the inhabitants of the said parish of Stow Market, and the promise to the plaintiffs as churchwardens. The third on an account stated with the plaintiffs as churchwardens, of money owing from the defendant to them as churchwardens, and the promise accordingly. The fourth on an account stated with the plaintiffs as churchwardens, of money owing from the defendant to the inhabitants of the said parish, and the promise to the plaintiffs as churchwardens, and the breach was laid to the damage of the inhabitants of the said parish.

At the trial before Mr. Justice Ashhurst at the last Suffolk assizes, the plaintiffs were nonsuited, chiefly on two grounds, 1st, That they were not duly appointed churchwardens, and
[560] 2ndly, That they were not the immediate successors of the defendant in the office.

* This recognised as an established rule in *Wilkinson* v. *Verity* (1871) L. R. 6 C. P. 206, 208, 40 L. J. C. P. 141.—R. C.

A rule having been granted to shew cause why the nonsuit should not be set aside, and a new trial granted, *Bond*, Serjt. shewed cause:

It is not sufficient to maintain this action, that the plaintiffs were churchwardens *de facto*, but they ought to be so *de jure*. Thus it is laid down 4 Vin. Abr. 527, *Andrews* v. *Eagle*, that if there be a churchwarden *de jure* and one *de facto* in the same parish, the latter cannot justify the laying out or receiving money, but he is accountable to the former: he is no more than another man, and he that is *de jure* may bring an *indebitatus assumpsit* against the other. Here the custom of the parish being for the vicar to choose one churchwarden, and the parishioners the other, the election of both by the parishioners was clearly illegal, and therefore the plaintiffs were only churchwardens *de facto*. By the 118th Canon the office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens who shall succeed them shall be sworn, that is who shall lawfully succeed them. But whether they were duly or unduly elected, they are not entitled to bring the action, not being the immediate successors of the defendant. It appears from 4 Vin. Abr. 530, and 1 Burn's Ecclesiastical Law, 381, that the next succeeding churchwardens are to have an action of account against their predecessors. There is no privity except between the predecessors and the immediate successors, and the law will not imply an *assumpsit*, after a party has been so long out of office that several sets of successors have intervened.

Le Blanc, Serjt. on the other side was stopped by the COURT, who were very clearly of opinion that the action was maintainable by the plaintiffs, on both the grounds taken in the argument; that being admitted, and sworn into the office, and acting as churchwardens, the defendant, who was a wrong-doer in with-holding the money, should not be permitted to deny their right to bring the action; and that churchwardens being a corporation for the purpose of taking care of the goods of the church, the right to sue for money withholden from the parish passed from one set to the other, it being perfectly immaterial

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TURNER v. BAYNES.

whether the immediate or any other successors of the defendant brought an action which was not founded in privity between them.

Rule absolute.

1795.
Nov. 27.
[573]

ADAM *v.* RICHARDS.

(2 H. Bl. 573—574.)

Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, &c., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term trial means a reasonable trial.

THIS was an action on the warranty of a pair of coach-horses, "that they were perfectly sound, free from blemish, and in no manner vicious, and that if on trial the said geldings should have any of the before-mentioned faults, the defendant would take them again, and allow the plaintiff his purchase-money."

At the time of the sale the defendant gave the plaintiff a receipt in the following words:

"LONDON, *6th December*, 1794.

"Received of John William Adam, Esq. ninety guineas for a pair of brown bay coach geldings, which I warrant perfectly sound, free from blemish, and in no manner vicious; and if on trial they should have any of the before-mentioned faults, I agree to take these horses again, and allow Mr. Adam his purchase-money.

"JOHN RICHARDS."

Soon after the sale, it was discovered that one of the horses was vicious and restive in harness, and there was evidence that he was so at the time of the sale: of this the plaintiff informed the defendant, but continued to keep the vicious horse for several months, partly at the persuasion of the defendant, and partly

from his own supposition that the horse would improve, and go better as he was more used. The plaintiff afterwards turned the horse out to grass for some weeks, and then sent him to the defendant, who supplied another for a temporary purpose, till a better could be procured to match the remaining one of the pair. After this, the plaintiff took the restive horse again from the defendant, and returned him the borrowed one, the defendant saying that the restive horse would then go very well: and it was not till some days after this, namely, on the 23rd of July, 1795, that the plaintiff finally returned the pair to the defendant, and demanded back the purchase-money.

On this evidence a verdict having been found for the defendant, *Bond*, Serjt. now moved for a new trial, relying on the case of *Fielder* v. *Starkin*, 1 H. Bl. 17,* to shew that as there was an express warranty, and as the horse appeared to have been restive at the time of the sale, it was not necessary that he should be returned, to make the defendant liable to an action on the warranty. [574]

But the COURT said, that though they fully assented to the doctrine laid down in *Fielder* v. *Starkin*, yet where there was an agreement to take a horse back, if on trial he should be found faulty, though it were accompanied with an express warranty, it was incumbent on the purchaser to return the horse as soon as the faults were discovered, unless the seller by any subsequent misrepresentation induced the purchaser to prolong the trial.† That a trial meant a reasonable trial, but here six months had elapsed, after the horse was known to be restive, and before the return. The verdict therefore was proper, and ought not to be set aside.

Rule refused.

* 2 R. R. 700.

† Referred to in judgment by BOVILL, C. J. in *Heilbutt* v. *Hickson* (1872) L. R. 7 C. P. 438, 452, 41 L. J. C. P. 228.—R. C.

1795.
Nov. 28.
[582]

MARSH, Knt., and Others *v.* FAWCETT, Clerk.

(2 H. Bl. 582—583.)

Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it from time to time after it is returnable till the sum indorsed be satisfied, yet if it be actually returned, the authority of the Bishop is at an end. Therefore where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the return day, the Court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was actually returned.* The proper way to proceed is to rule the Bishop from time to time to know what he has levied.

In August, 1794, a *levari facias de bonis ecclesiasticis* issued to the Bishop of Winchester, at the suit of the plaintiffs, against the defendant, returnable in fifteen days of St. Martin, and indorsed to levy 125*l.* (being the arrears of two annuities, to secure which judgment had been entered on a bond), on which a sequestration issued. On the 25th of April following, the Bishop was called upon by rule of Court to return the writ, which he accordingly did, stating, "that the defendant was a beneficed clerk and vicar of the parish and parish church of Milford in his diocese, that he had caused to be levied of the fruits, tithes, &c., which had arisen or accrued thereupon since the delivery of the writ, the sum of 14*l.* 18*s.* 10½*d.*, of which he had retained 4*l.* 19*s.* 3¾*d.* for tenths and land tax, and 3*l.* 6*s.* for the costs of the levy, and had caused the residue to be paid to the plaintiffs' attorney in satisfaction of their debt and damages: and certified that since the delivery of the writ to him there had not been, arisen, or accrued any further fruits, tithes, profits, &c., from the said parish or parish church of Milford, nor had the defendant any other ecclesiastical goods within his diocese, whereof he could cause the residue of the said debt and damages, or any part thereof, to be levied."

Between the 25th of November, the return day of the writ, and the 25th of April, the sequestrator had received a much

* *Vide Arbuckle* v. *Cowtan*, 3 Bos. & Pul. 327.

larger sum from the profits of the living, which after certain deductions remained in his hands, and which, together with the sum before levied, amounted nearly to 125*l.* the sum indorsed, and several other writs of *levari facias* had been delivered to the Bishop at the suit of other plaintiffs against the defendant, some before the return day of the first writ, and some after.

A rule having been granted to shew cause why the Bishop and his sequestrator should not proceed to levy the plaintiff's debt out of the growing profits of the vicarage, and why the writ and return should not be taken off the file, and the writ be amended [583] by indorsing on it to be levied, the sum of money then actually due to the plaintiffs,

Adair, *Le Blanc*, and *Cockell*, Serjts. shewed cause, on the part of the Bishop and the other creditors, contending, that after the writ was actually returned, the Bishop's authority to levy, and consequently that of the sequestrator, was at an end, and therefore that as to the growing profits of the vicarage, the plaintiffs had lost their priority, and must now be postponed to the other creditors who had sued out their writs.

Bond, Serjt. in support of the rule:

The writ of *levari facias* is a continuing execution, and the officer of the Bishop must take care that all the profits of the living sequestered be applied to satisfy the sum due to the plaintiff in the writ first delivered to him, in preference to any other. If the sequestration issues, and is published before the writ is returnable, it is sufficient, and the plaintiff is intitled to the growing profits from time to time, though long after it is returnable, until he is satisfied. *Legassicke, Executor of Adams* v. *The Bishop of Exeter*, 1 Cromp. Pract. 359.*

Per CURIAM:

This is certainly in its nature a continuing execution,† unless

* See also 3 Burn, Eccl. Law, 322, 8vo.

† If the writ was not returned, the execution would undoubtedly continue until the sum indorsed was satisfied. But *Qu.* whether the plaintiff could, after that sum was levied, preserve his priority, with

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MARSH v. FAWCETT.

the plaintiff takes away the authority under which the sequestration issues, by calling generally for a return of the writ. The mistake here was in calling for that return. The proper way would have been to have ruled the Bishop from time to time, to know what he had levied. All that can be done now is, to amend the return, by inserting the amount of the whole sum received under the sequestration, up to the 25th April.

The rule was made absolute, not to take the writ off the file, but for the Bishop to amend the return by stating the amount of the sum levied up to the time when the return was actually made.

Le Blanc referred to Rast. Entr. 37, for the form of a *levari facias de bonis ecclesiasticis* to levy the arrears of an annuity on a writ of annuity, and the Bishop's return.

C. P. HILARY TERM.

MICHEL *v.* PARESKI.

(2 H. Bl. 593.)

1796.
Feb. 4.

[593

After the defendant has agreed to take short notice of trial, the Court will not compel the plaintiff, a foreigner and resident abroad, to give security for costs.

ADAIR, Serjt. shewed cause against a rule calling upon the plaintiff, who was a foreigner and resident at Danzic, to give security for costs, in an action on a policy of insurance. Though

regard to the future arrears of the annuity, over another judgment creditor, who might have delivered another writ to the Bishop, in the interval after the sum indorsed on the former writ was levied, and before the time of the next periodical payment arrived? The equitable interposition of the Court seems hitherto to have extended no further, in cases of judgments entered on bonds to secure annuities, than to permit the judgment to stand as a security for the future payments, and fresh executions to be taken out as those payments became due, without a suggestion or *scire facias* under the stat. 8 & 9 W. III. c. 11; *Howell* v. *Hanforth*, 2 Black. 843, 1016; *Ogilvie* v. *Foley*, *ib.* 1111; *Scott* v. *Whalley*, 1 H. Bl. 297.

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he admitted the general rule that a foreigner so situated was compellable to give such security, yet in the present instance he contended that the plaintiff was exempted from the rule, as the defendant had obtained time to plead, and had agreed to take short notice of trial, for the last sittings in the term; the application therefore came too late, as it must evidently delay the plaintiff.

The COURT were very clearly of this opinion, saying that as the defendant had agreed to take short notice of trial, he had waived his opportunity of making this application, which must necessarily delay the plaintiff.

Rule discharged.

OWEN *v.* SMYTH.

(2 H. Bl. 594—600.)

1796. *Feb.* 5.

[594]

A limitation in a deed, to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue, to the second, third, and other sons of A., and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of A.

THIS case, which was sent by the Lord Chancellor for the opinion of this Court, stated, that in the year 1769, George Smyth the elder had four children, viz. George Smyth his eldest son then married, Nicholas his second son then married, John his third son then unmarried, and Sally his only daughter then the wife of Samuel Sandys.

That by indenture of feoffment of the 18th of July, 1769, certain lands were conveyed by George Smyth the father and George Smyth the son to feoffees, to hold to them and their heirs upon such trusts as the said George Smyth the father and George Smyth the son should appoint, and in default of such appointment as to part of the premises, to the use of George Smyth the father for life, and as to the residue, to the use of the trustees for a term of sixty years, and after the death of George Smyth the father and subject to the term, as to all the lands to use of George Smyth the son for life, remainder to trustees to preserve

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contingent remainders, remainder to other trustees for a term of 500 years, and subject to that term to the use of the first son of the body of the said George Smyth the son, on the body of any wife which he should thereafter marry, to be begotten, and of the heirs male of the body of such son lawfully issuing, and for default of such issue, to the use of the 2nd, 3rd, 4th, 5th, 6th, [595] 7th, 8th, 9th, 10th, and all and every other the son and sons of the body of the same George Smyth, on the body of such wife to be begotten, and of the several heirs male of the body or bodies of all and every such son and sons respectively issuing, &c. and for default of such issue, to the use of trustees for a term of 600 years, and subject to that term, to the use of Nicholas Smyth the second son of George Smyth the father for life, remainder to trustees to preserve contingent remainders, remainder to trustees for a term of 700 years, and subject thereto to the use and behoof of the first son of the body of Nicholas Smyth lawfully issuing, and for default of such issue, to the use and behoof of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and of all and every other son and sons of Nicholas Smyth, lawfully issuing, whether born in his lifetime, or after his death, severally and successively in remainder one after another, as they and every of them shall happen to be in priority of birth, and senority of age, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, so that the elder of such sons and the heirs male of his and their bodies shall be always preferred, and take before the younger of the same sons, and the heirs male of his and their body and bodies lawfully issuing, and for default of such issue to trustees for a term of 800 years, and subject thereto to John Smyth the third son for life, and to his first and other sons in tail male, remainder to the daughter Sally Sandys for life, and to her first and other sons in tail, remainder to the right heirs of the survivor of George Smyth the father and George Smyth the son.

There were also jointuring powers given to George Nicholas, and John, the sons of George Smyth the father, the words of the power, as it related to John Smyth, being, "It shall and may be lawful to and for the said John Smyth, in case he shall survive both the said George Smyth the son, and the said Nicholas

Smyth, and they both shall depart this life without leaving any issue male of any of their bodies lawfully begotten, by any deed or deeds, &c."

The trusts of the term of 800 years were, if the said George Smyth the son should depart this life without leaving any issue of his body lawfully begotten as aforesaid, and the said Nicholas Smyth shall happen to have no issue male of his body lawfully begotten, born in his lifetime or after his decease, or there being such issue male, all of them should happen to die without issue male of any of their bodies, before any of them should attain the age of twenty-one years, and there should be issue one or more daughter or daughters of the body of the said Nicholas Smyth lawfully issuing, then the trustees of the term, after failure of [596] issue male of Nicholas Smyth, and after his decease, should raise portions, &c.

By the same deed, a rectory holden for lives of the Dean of Lincoln was limited to trustees, to permit and suffer George Smyth the father to take the rents during his life, and after his decease to permit George Smyth the son to take the profits during his life, and after the decease of the survivor of the said George Smyth the father, and George Smyth the son, in trust for the issue male of the body of the said George Smyth the son. "And in case there should be no such son or sons, or there being such, he and they shall die before any of them shall attain the age of twenty-one years, and without issue male, then in trust to permit and suffer the said Nicholas Smyth and his assigns to receive and take the rents, issues and profits of the same premises for and during his natural life, in case the same lease shall so long continue, to and for his and their own proper use and benefit, and from and immediately after the death of the said Nicholas Smyth, then in trust for the eldest or only son for the time being of the body of the said Nicholas Smyth lawfully begotten, until such only son or some one such son shall first attain the age of twenty-one years, or die leaving issue male of his body, and then in trust for such son so attaining twenty-one or dying leaving issue male of his body, and for such issue male, &c. and a lease of tithes from the Dean and Chapter of Christ Church Oxford, was also limited in the same manner."

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George Smyth the father and George Smyth the son both died, the latter without issue, and they made no joint appointment.

Nicholas Smyth the second son died, leaving the plaintiff his only son and heir at law. And the question for the opinion of the Court was,

What estate the plaintiff took in the premises in question?

On the part of the plaintiff, *Williams*, Serjt. argued as follows:

It is clear upon the face of the deed, that the intention of the parties to it was that the first son of Nicholas Smyth should take an estate-tail. * * *

[597] The limitation to the several heirs male of the body and bodies of all and every such son and sons respectively issuing, may be applied to the first son of Nicholas Smyth, as well as to any other. The only difficulty there is, arises from the words "for default of such issue," which follow the limitation to the first son of the body of Nicholas Smyth lawfully issuing. But those words may be construed to mean the want of issue of the first son of the body of Nicholas Smyth, and then such first son would take an estate-tail: for the same construction was put on the words "for want of such issue," following a limitation to every son and sons of A. which should be begotten on the body of his wife, in *Evans* v. *Astley*, 3 Burr. 1570: and though that was a case on the construction of a will, yet where the intent of the parties to a deed to uses can be clearly collected from the deed itself, the deed shall be so construed as to effectuate that intent according to the doctrine laid down, *Lisle* v. *Gray*, 2 Lev. 225; *Leigh* v. *Brace*, Carth. 343; *Doe, on dem. of Watt* v. *Wainewright*, 5 Term Rep. B. R. 427.* And accordingly in *Doe, on dem. of Willis* v. *Martin*, 4 Term Rep. B. R. 39,† where the intention was plain, and the limitation was, in default of an appointment, "to the use of all and every the [598] child or children equally share and share alike, to hold the same as tenants in common and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns for

* 2 R. R. 634. † 2 R. R. 324.

ever," the Court supplied the words "their heirs," from the words "his or her heirs," and annexed them to the limitation "to all and every the children as tenants in common," so as to give all the children vested remainders in fee.

Bond, Serjt. *contrà:*

No latitude of construction, nor any conjecture as to the intention of the parties can be allowed in a voluntary feoffment, beyond the precise meaning which the particular words used in the limitation import. Now as the limitation in the deed is to the first son of the body of Nicholas Smyth lawfully issuing, without any other words superadded, such first son could only take an estate for life, notwithstanding the intent might have been to have given him an estate-tail: this is a complete sentence, and then the deed goes on, "and for default of such issue, to the use and behoof of the second, third and other sons in succession, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, and the heirs male of his and their bodies respectively issuing." Now the words "for default of such issue" begin a new and distinct sentence; and though they appear to mark the event in which the limitation to the other sons successively in tail male is to take effect, for the words "such son and sons" clearly relate to the second, third and other succeeding sons, yet whatever implication may be made in a will, in favour of the intention of the testator, as in *Evans* v. *Astley*, the Court will not give an estate-tail by implication in a deed. * * *

LORD CH. J. EYRE:

I think this is one of the clearest cases I ever saw: there is demonstration plain on the face of the feoffment, that it was the intent of the parties that an estate-tail should be limited to the eldest son of Nicholas Smyth. The argument on the part of [599] the defendant has occasionally shifted, sometimes admitting the intent, but contending that the words used were not sufficient to effectuate that intent, which I thought was the true way of considering the question, and sometimes denying the intent itself. But no man can read this deed without seeing the intent

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I have mentioned, though by some strange blunder the usual words are omitted. If indeed it had stopped at the limitation to the first son of Nicholas, I should have agreed with the counsel for the defendant; for it certainly does not follow, that because one can see an intent on the face of a deed, therefore that the words used are sufficient to effectuate that intent. But the intent here does not rest on the first expressions, but the other parts of the deed respecting the trusts and other limitations, which were ably discussed by my brother *Williams*, refer to an estate-tail in the first son of Nicholas Smyth. The intent then being plain, the question is, whether we can find sufficient words? I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds as we do in wills. But here it is not necessary to resort to implication, or to inquire whether the same latitude is to be allowed to conveyances to uses as to wills. For here there are strict technical words capable of being applied to the limitation to the first son of the body of Nicholas Smyth, so as to give him an estate-tail. The limitation is to the first son, and for default of such issue the whole line of sons is taken in without any particular limitation to them and the heirs of their bodies *nominatim*, but it is "to the several heirs male of the body and bodies of all and every such son and sons respectively issuing." Fortunately it is not said "to the heirs male of the body and bodies of such second, third and other sons, &c.;" if it had been so, perhaps it could not have been got over. But the limitation is to the heirs male of the body and bodies of "every such son." Now the case of *Doe* v. *Martin* is an authority to warrant the application of those words to the limitation to the first son of Nicholas Smyth, as well as to the others. But this case is stronger than *Doe* v. *Martin*, for it does not even require the assistance of punctuation. Upon the whole therefore it is clear that the plaintiff took an estate-tail under the limitation in the deed to the first son of the body of Nicholas Smyth.

HEATH, J. of the same opinion.

ROOKE, J. of the same opinion.

The certificate accordingly stated, that the plaintiff took an estate in tail male in the lands in question.

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[600]

LA GRUE, QUI TAM, *v.* PENNY.

(2 H. Bl. 600.)

1796, *Feb.* 6.
[600]

A plaintiff may sue in his own name, without an attorney, and subscribe the process with his name as attorney for the plaintiff, in any action.

MARSHALL, Serjt. obtained a rule to shew cause why the proceedings in this action should not be set aside, on the ground that the plaintiff, who was not an attorney, sued in his own right on a penal statute, without any attorney, and yet subscribed the notice upon the process, "John La Grue, attorney for the plaintiff."

Le Blanc shewed cause, observing that the parties were obliged to appear in person at common law, and that it was not till the stat. West. 2, c. 10, was passed, that liberty was given to sue or defend by attorney.* But still it continued optional either to sue in person or by attorney.

Marshall in support of the rule, insisted that whatever might have been the ancient practice, the usage of many ages and the several statutes imposing duties on attorneys, warrants to sue, and the like, had rendered that which was permitted only by the stat. West. 2, now indispensible: that it would be of mischievous consequence, if persons such as the plaintiff, who was described in the affidavit to be in low and indigent circumstances, were permitted to practise and bring actions on penal statutes in their own names, on whom notices, &c. could not be served,

* At common law, the King, by virtue of his prerogative, might empower either the plaintiff or defendant to appoint an attorney, by the writ of *dedimus potestatem de attornato faciendo*. F. N. B. 59. So also the party being present might name a *responsalis* to be appointed by the justices. Co. Litt. 121 a; 2 Inst. 249.

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without an attorney, who being an officer of the Court, was liable to be punished for any misconduct. Besides, the peril of costs was a restraint on bringing frivolous actions; but if the plaintiff should not have an attorney of his own to pay, it would lessen that restraint very considerably. But

The COURT clearly held, that the right of parties to sue or defend in their own name * still remained the same as at common law; that a penal action was the same as any other in that respect; and as to the plaintiff calling himself the plaintiff's attorney in the notice on the process, it was only a compliance with the directions of the statute † as nearly as the case would admit.

Rule discharged.

1796.
Feb. 10.
[603]

GIENAR *v.* MEYER.

(2 H. Bl. 603—608.)

Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country and the adjudication of their own Courts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship and cargo be confiscated in an English port, and the voyage thereby ended.‡

THIS was an action brought by a Dutch seaman against the master of a Dutch ship for wages. The plaintiff entered on board the ship at Rotterdam, on a voyage from thence to Barcelona, and back again from Barcelona to Rotterdam. In August, 1793, the ship sailed from Rotterdam for Barcelona, where she delivered her outward bound cargo, and took in another, with which she sailed for Rotterdam, but on her return was stopped by an English ship of war, brought into port, there detained a considerable time, and afterwards sold. On

* *Vide* Sayer's Rep. 217, *Uppendale* v. *Lightfoot.*

† Stat. 2 Geo. II. c. 23, s. 22. [Repealed by 6 & 7 Vict. c. 73; but see R. S. C. Ord. IV. r. 1.]

‡ Accord. *Johnson* v. *Machielsne*, 3 Campb. N. P. C. 44. See also Abbott on Shipping, 454, 5th ed.

that occasion, the commissioners appointed under the Act 35 Geo. III. c. 80, to regulate Dutch property, called on the defendant to deliver in accounts of the wages due to the mariners, in order that they might be paid out of the proceeds of the sale. The defendant accordingly made out a certificate of the wages due to the plaintiff, but calculated them as due only for the voyage from Barcelona to London in consequence of general directions from the commissioners to the masters of all Dutch ships detained, not to reckon them upon the whole time from the sailing of the ship from the first port, but from the port where the cargo which was on board at the time of the detention was taken in. The ship had been out from Rotterdam twenty-four months and seven days, eighteen months and seven days of which time were allowed for by the commissioners, and this action was brought to recover the wages due for the remaining six months for the voyage from Barcelona to Rotterdam, the freight for which the defendant admitted he had received, but insisted that he was not liable to be sued in this country, and that the plaintiff ought to resort to the courts of Holland for his remedy. This objection was grounded on the ship's articles, which, as translated from the Dutch, were in the following terms: [604]

"We the underwritten officers and mariners acknowledge to have hired ourselves in the service of the ship *Catharina Quirina*, commanded by Captain Hendrick Meyer, now lying at Rotterdam, and destined to Barcelona and all such places, bays, and sea-ports as the captain may deem most expedient to his owner's interest, for the monthly-wages agreed on and hereunder specified, and to sail with convoy the full month commencing from the day of the date hereof, and the voyage to end and be completed when we shall have returned with our said ship to this city or in any sea-port of this country, and that the cargo on board be unladen, and we duly discharged by our said captain. But in case that one or more complete voyages be made out of the country, the captain shall at every second place of delivery secure to us two-thirds of our wages, by an order on his purser or correspondent resident here, and the remaining third on the discharging and paying off the crew. But if the captain shall be obliged to

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touch at different places and shall there load or unload some goods, it is not to be considered as the performance of perfect voyages."

There then followed some regulations respecting the discipline of the ship, and afterwards the following article:

"None of us shall institute any suit against the master of the ship in foreign countries, or cite him before any judge or magistrate, but shall from thenceforth be bound to abide by the ordinances of the maritime code of this city, and the adjudication of the noble Court of Holland." Lastly, we the underwritten "respectively, and each for himself acknowledge, that we have bound ourselves under the hereinbefore specified conditions, and that we have now received one month in advance of our stipulated wages, and have subscribed these with our usual signatures; done at Rotterdam, the 29th of August, 1793."

The CHIEF JUSTICE was of opinion at the trial, that as the plaintiff had agreed by the articles not to sue the master in any foreign country, the action could not be maintained; his Lordship therefore directed a nonsuit, subject to the opinion of the Court, on the facts above stated.

A rule having been granted to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff,

[605] *Adair*, Serjt. shewed cause:

By the terms of the articles, though Barcelona was a destined port, yet the master was at liberty to go to any other port he might think expedient. It was therefore in the contemplation of the parties that the ship might go to any other foreign country. With this in view, they enter into a solemn engagement not to institute any suit against the master in any foreign country, but to abide by the maritime code of Rotterdam, and the adjudication of the Court of Holland: and having so done, they cannot be permitted to sue in the courts of this country in direct violation of their engagement. It is not necessary to resort to the laws of Holland to ascertain the validity of this contract, for if it had been executed in England, it would be binding. It is a just and reasonable contract, as it would be productive of great hardship and inconvenience to the master, if he were to be sued

in a foreign country where he had no funds to answer the demand. If a ship is taken or lost before any complete voyage is performed, the mariners are not entitled to any wages at all, though by a construction favourable to them, one voyage is divided into two, namely, the outward and homeward bound voyage; it would therefore be very doubtful whether the plaintiff could have recovered any part of his wages for the former eighteen months, if it had not been given him by the bounty of the Crown.

Le Blanc, Serjt. *contrà:*

As the defendant received freight for the outward-bound voyage, and as freight is the mother of wages, the last argument used on the part of the defendant falls to the ground. The only question is, Whether the articles will prevent the plaintiff from bringing an action in this country? It is not a deed under seal, but merely a written agreement, which may be construed according to the circumstances of the case, and the nature of the voyage performed. The meaning of the latter clause is, that the mariners will not sue before the end of the voyage, not that they will not sue at the place where the voyage is ended. It is true, that the articles consider the voyage as to be ended in Holland, but they do not provide for the case which has really happened, that of the voyage being ended in another country. Suppose the master had discharged the men here, and remained here himself, without their having the means of returning to Holland, they could not in that case have been obliged to sue in Holland where neither he nor they were resident. Or suppose the ship to be so damaged in a foreign port, as to make it necessary to sell her and the cargo, and the master had received [606] the money, surely the mariners might have sued at that place. And it was holden in *Chandler* v. *Grieves*,* in this Court, that where a seaman was prevented by an accident from performing the whole voyage, he was still intitled to his wages for the whole. The ship in the present case was neither taken in battle nor lost, but the voyage was ended, and if the seamen can sue nowhere but in Holland, the captain must provide some

* *Chandler* v. *Grieves*, in C. B. Hil. 32 Geo. III. See p. 525, *post*.

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means of conveying them to that country. But being a stranger in this country, he cannot do that when his ship is taken from him.

LORD CH. J. EYRE:

Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the King's Courts, and though it must be admitted that contracts [607] are transitory, and that a personal action follows the person, and that the contract in question is of such a nature as to be agreeable to our laws, yet when the parties, who are foreigners, bind themselves in their own country not to sue in any other, and when by suing here they put the defendant under an intolerable hardship, I think we ought to look into the contract, in order to see what effect it would have, and how it would be enforced in the country where it was made, that we may not do any thing here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws, or at least as there is no evidence to shew that it is not good, we must presume it to be so. Then the first thing that stares us in the face is, an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in Holland, the contract is to perform the whole voyage ending in Holland, and to seek their remedy in their own courts of justice. As a maritime contract, it is clearly a beneficial one, as it creates an additional tie on the seamen not to leave the ship in any part of the voyage. Then if the contract be agreeable to the laws of Holland, what are the particular circumstances of the case? The ship and cargo are seized, but the men are not made prisoners, but are at liberty to return to their own country. Now it is obvious that the master would be placed in a very cruel situation, if after the ship and cargo were confiscated, he was to be sued in a foreign country for wages for a voyage, the proceeds of which might be either remitted, or on board the ship so confiscated: the effect of it might be to cause him to lie in a foreign gaol, perhaps for life. It seems therefore to me more reasonable to send the parties to their own country, there to pursue their remedy.

HEATH, J. of the same opinion.

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ROOKE, J.:

There is no doubt of the right of the plaintiff to the wages, the only question is, whether the defendant is liable to be sued here? Now the words of the articles are positive, that the mariners will not institute any suit in foreign countries, but will be bound to abide by the ordinances of the maritime code of Rotterdam, and the Court of Holland. If so, the construction contended for by my brother *Le Blanc*, with respect to the voyage being ended in another country, is unfounded. There is nothing to prevent the parties from going to Holland: and as to the supposed case of the captain not being there, if the law of Holland is like that of our own country, which we must for this purpose take it to be, the owners would be liable to the seamen, [608] though the master were absent. The hardship thrown on the master by a contrary construction, would be grievous in the extreme. I therefore think that the nonsuit was right.'

Rule discharged.

The following case is reported in H. Blackstone's Reports, in a note to the case of *Gienar* v. *Meyer:*

CHANDLER *v.* GRIEVES.

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[606]

IN C. B. HIL. 32 GEO. III.

(2 H. Bl. 606, 607, n.)

A seaman belonging to a merchant ship which is articled for a certain voyage, is prevented from performing the whole voyage by being disabled by an accident happening in the course of his duty: he is entitled to wages for the whole voyage.*

THIS was an action of *assumpsit* for a seaman's wages. The facts of the case were, that the plaintiff was a seaman on board a ship which was articled for and sailed upon a voyage from London to Honduras, from thence to Philadelphia in North America, and from thence back again to England. The articles were drawn in the usual form. While the ship was in the Bay of Honduras, the plaintiff received so violent a blow from a piece

* Accord. *Paul* v. *Eden*, cited Abbott on Shipping, 444, n. 5th ed.

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of timber accidentally falling upon him while he was on board, that he was entirely disabled from doing any duty whatever. On the arrival of the ship at Philadelphia, he was put on shore and there left, and his wages paid up to that time, but this action was brought for the whole wages, including the remainder of the voyage, viz. from Philadelphia to England.

Lord LOUGHBOROUGH was of opinion at the trial, that as the plaintiff had not performed the whole voyage, though without any default on his part, he was not entitled to wages for the whole. The jury took a middle course, and gave a verdict for the amount of the wages up to the time when the ship left Philadelphia.

In Michaelmas Term, 32 Geo. III. a rule was granted to shew cause why the verdict should not be set aside and a new trial granted, and now *Bond*, Serjt. shewed cause, contending that the plaintiff was entitled to wages for the whole voyage, on two grounds: first, that in general by the common law, no contract for wages was apportionable: secondly, that in particular by the law marine and usage of the sea, contracts for seamen's wages could not be apportioned. To establish the first point, he cited Bro. Abr. tit. Apportionment, pl. 13; id. tit. Labourers, pl. 48; id. tit. Contract, pl. 31; 3 Vin. Abr. 8 & 9 Burr. Settl. Cases, 675; *Rex* v. *The Inhabitants of Madington*. In support of the second, 15 Vin. Abr. tit. Mariners, 234; Miege's Laws of Oleron, p. 5, s. 7, p. 8, s. 19; Malyne's Lex Merc. 103, c. 22; and he observed, that the laws of Oleron were received by all nations in Europe, 1 Black. Comment. 419; 4 Black Comment. 423, and ought to prevail in the present case.

The COURT said, that clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Courts of Admiralty whether, according to the usage there adopted, a disabled seaman in similar circumstances would be entitled to wages for the whole voyage, or only up to the time when he was so disabled?

On this day, the counsel for the defendant stated, that in pursuance of the direction of the Court, an inquiry had been

made as to the usage of the Admiralty, and that in every instance there to be found, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though he had not performed the whole. In consequence of which

The rule was discharged.

NICHOLSON *v.* GOUTHIT.

(2 H. Bl. 609—612.)

1796. *Feb.* 11.

[609]

A person who undertakes to become security for a debt, and does so by indorsing a promissory note of the debtor, which is handed to the creditor, is discharged by want of due presentment of the note for payment to the principal debtor, although the creditor knows that it will not be paid by him.*

ASSUMPSIT by the indorsee against the indorser of a promissory note, which was made on the 3rd of March, 1793, by William and Samuel Green for 50*l.* payable to the defendant at eighteen months, at the house of Drury & Co.; the defendant [610] indorsed it to Burton, and he to the plaintiff. The facts of the case were, that the Greens being considerably indebted to various creditors, and among the rest to the plaintiff, it was agreed that their debts should be paid by instalments, the last of which Burton and the defendant undertook to guarantee, for which purpose the note in question was indorsed (with others to other creditors) by them as a security for the debt due to the plaintiff. A little time before the note became due, the defendant knowing that Drury & Co. had no effects in their hands of the Greens, directed them to refer the persons who should present the notes at their house for payment, to him, and he would pay them. Many of the notes were accordingly brought to the defendant when they were due, and were paid. But the note in question, though due on the 3rd of October, 1794, was not demanded at the house of Drury & Co., till the sixth of that month, on which day it was presented to the defendant, though the parties all lived near each other. If it had been presented to him when due, it would have been paid, as Burton had lodged a sufficient sum of money in his hands for that purpose, but

* See now Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 46 (2).

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which he paid away, when he found the note did not come to him as he expected.

At the trial it was objected, that the plaintiff had been guilty of laches, as he had neither demanded payment of the note at the place where it was payable, in due time, nor given notice to the defendant of non-payment by Drury & Co., and therefore could not recover.

But the CHIEF JUSTICE was of opinion that under the particular circumstances of the case the strict rule of law might be dispensed with, for as the defendant knew from the beginning of the transaction, that Drury & Co., at whose house the note was payable had no effects of the Greens in their hands, as he had undertaken to guarantee the payment of a debt by means of the note, and had provided money for that purpose, he could not be injured by the delay of the plaintiff, from the third to the sixth of October; and with respect to the want of notice, his lordship thought, that as the defendant had himself desired Drury & Co. to send the notes to him for payment, he had either waived the necessity of notice, or at least must be considered as having had notice by anticipation; and a verdict was found for the plaintiff.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered, *Bond*, Serjt. in [611] shewing cause rested on the opinion of his Lordship at *Nisi Prius*, which is above stated.

In favour of the rule *Cockell* and *Heywood*, Serjts. argued that the rule of law which required both a demand as soon as the note became due, and immediate notice in case of non-payment, could not be dispensed with, and in the present instance there had been neither. Unless such demand be made on the maker, and notice given to the indorser as early as possible, no period can be fixed when the liability of the party shall cease. It is true that where the drawee of a bill of exchange has no effects of the drawer in his hands, notice of non-acceptance or non-payment need not be given to the drawer; yet the rule with respect to an indorsee is totally different, to whom notice of the default of the drawee must in all cases be given, in order that he

may seek his remedy against the drawer or any prior indorser. Thus, though it is not necessary to present a bill for acceptance before the day of payment, yet if it be presented for acceptance before that day, and the drawee refuses to accept it, immediate notice of such refusal must be given to the indorser, to make him responsible, 5 Burr. 2670, *Blesard* v. *Hirst;* 1 Term Rep. B. R. 712,* *Goodall* v. *Dolley*. But in truth there is no analogy between bills of exchange and promissory notes, in their nature or original creation. A bill of exchange is a transfer by A. of a debt due to him from B. to C.; a promissory note is an acknowledgment by A. of a debt due from him to B., and a promise to pay it. The resemblance between the two instruments begins only when the note is indorsed: "for then," (to use the words of Lord MANSFIELD in *Heylin* v. *Adamson*, 2 Burr. 676,) "it is an order by the indorser upon the maker of the note to pay to the indorsee. The indorser only undertakes, in case the maker of the note does not pay: the indorsee is bound to apply to the maker of the note; he takes it upon that condition, and if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the indorser at all." As to the particular circumstances of the case, when it was agreed that the defendant should become a surety for the Greens by indorsing a promissory note, it must have been understood by the parties that as he stood in the character of an indorser, he had a right to insist that the holder of the note should use due diligence before he should be sued: for it is a clear rule that the mere knowledge of the indorser that a bill or note has been or will be dishonoured, will not be [612] equivalent to, nor does it dispense with notice to him from the holder.

LORD CHIEF JUSTICE:

That the justice of this case is with the plaintiff, there can be no doubt. The defendant agreed to guarantee the payment of a debt by instalments; it was clear that the Greens were insolvent, and the meaning of the parties was, that in that event the debt should be paid by the defendant. The difficulty arises from the

* 1 R. R. 372.

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mode which they have chosen in which the guarantee shall take place, by the indorsement of a note. The question then is, whether, when the guarantee is taken in this shape, all the legal consequences do not follow so as to limit its generality? Upon consideration, I cannot say that they do not follow, and they require a demand on the maker, and notice to the indorser within a reasonable time. Now though there were both in this case, yet neither was in reasonable time. The rule of law therefore must prevail, and that will discharge the defendant. When he applies to Drury & Co., and is apprised that there are no effects in their hands, he says, "send the notes to me, and I will pay them." Now this seems to be the same as saying "If the notes are presented to you for payment, I will pay them." But this must be construed to mean, that if they were duly presented he would pay them. There is nothing to shew that he meant to pay them at whatever time they should be presented. The conversation between these parties seems to have been nothing more than an acknowledgment by Gouthit, that he was indorsee, and that if the notes were sent to him in the regular course, they would be paid. If we could go beyond this, we might reach the justice of the case. But perhaps it is better to adhere to a rule, however strict, than relax it. It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with.

HEATH, J. of the same opinion.

ROOKE, J. of the same opinion.

Rule absolute.

HOWARD AND ANOTHER *v.* BAILLIE, EXECUTRIX OF BAILLIE.

(2 H. Bl. 618—626.)

1796. *Feb.* 12.

[618]

GARDNER *v.* BAILLIE.

(6 T. R. 591—593.)

Semble according to the decision of the judges of the Common Pleas, that a letter of attorney given by an executor to A., enabling him in the name and place of the executor or executors to transact the affairs of the testator, and to pay, discharge and satisfy all debts due from the testator, conveys a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable.

Secus, according to the judgment of the King's Bench (*Gardner* v. *Baillie*).

But clearly if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill, or of ratification of the act of acceptance, without resorting to the letter of attorney.*

THE facts of this case, and such of the arguments as were material, are stated in the following judgment, which was thus delivered in the name of the Court by the

LORD CHIEF JUSTICE:

A new trial has been moved for in this cause, in which the plaintiffs, being the drawers of a bill of exchange upon the defendant dated 10 January, 1794, for 290*l.* 18*s.* 3*d.* value in account with James Baillie (whose executrix the defendant is), payable upon the 1st of September, 1795, to their own order, and which bill of exchange was accepted by the defendant by Edmund Thornton her procurator, having recovered a verdict for 330*l.* damages. The ground made for this application is, that upon the case in evidence Mr. Thornton was not the procurator of the defendant duly authorized to accept this bill

* See *Gardner* v. *Baillie*, *post*, p. 538, in which, upon an action being brought upon another bill accepted by A. in the name of the executor, the Court held, that the plaintiff was not entitled to recover, and stated that the judges of this Court concurred in that resolution. It seems therefore that the present case must be considered as having been determined on the admission of the executor. See also *Hay* v. *Goldsmidt*, cited 1 Taunt. 349.

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for her. The case was shortly this, Mrs. Colin Baillie being the sole acting executrix of James Baillie, who died possessed of a large West India and other property, and largely indebted to many persons, and among others to the plaintiffs in the sum of 290*l.* 18*s.* 3*d.*, executed a power of attorney to George Baillie and Edmund Thornton jointly and severally to act for her in collecting and getting in the estate of the deceased, and paying his debts. These two persons acted under the power. The business respecting the estate was transacted by one or other of them at the counting house where James Baillie's business was carried on in his life-time, and where the business of a new firm, at the head of which was George Baillie, was also carried on after the death of James Baillie. At this counting house the bill in question was accepted, in the name of the defendant, by Edmund Thornton, one of the attornies, as her procurator, in payment of a debt due from the estate of James Baillie; and this was a mode adopted by the attornies (whether with or without the privity of Mrs. Baillie at present I do not stay to inquire), for the payment of the tradesmen's bills due from the estate. For the defendant it is insisted, that the attornies had no authority to provide for the payment of the testator's debts in this manner, that they were to administer the assets for the executrix, but that they could do no act whereby she should become chargeable with the debts in her own right, and particularly that they were not authorized to give a security for the [629] payment of any debts in her name. This makes it necessary to look into the power of attorney, to view and to consider the general scope of it, and to examine the different parts of which it consists, as far as they may seem to bear upon the present question. The general scope of it is to put the whole estate into the hands of the attornies, to commit the collecting of it, and the disposition of it entirely to them, to delegate to them all the authority that the executrix possessed, and to constitute them, as far as it was possible to constitute them, executors in her name. The first part of the instrument respects more particularly the collecting of the estate; and powers more ample could not be devised, nor confidence more unlimited be reposed and expressed. The authority to pay, discharge and satisfy

debts is described in few words, and more general terms, and with a qualification properly applicable to this branch of the power, "agreeably to the due order and course of law, to pay, discharge and satisfy," which I consider as tantamount to saying in a course of administration. Then follows a general authority to do such further lawful and reasonable acts, for the better performing the powers and authorities intended to be given, as to them should seem meet, the executrix professing to give to them her full and whole power and authority to do and act touching and concerning all or any of the premises, as fully and effectually to all intents, constructions and purposes, as she as executrix could do if personally present, and undertaking to ratify all that the attornies should lawfully do in and about the premises. There is also power to appoint attornies to act in the name of the executrix. The authority to pay debts, upon the first view of it, seems to be more confined and specified than the authority to collect the effects; but if we consider it more attentively, we shall find that the effect of this part of the instrument is to commit the application of the personal estate in payment of debts to those attornies absolutely and exclusively; and it will also be found, without the assistance of general words, that an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power, which in this case is the paying, satisfying and discharging the testator's debts. It must occur to every man who reflects upon the nature of this trust, that numberless arrangements would be to be made by those who were to execute it, accounts to be settled, disputed claims to be adjusted, unjust ones to be resisted, suits at law [620] and in equity to be instituted and defended, payments to be postponed or installed, according to the state of the fund, and perhaps if the estate should be discovered to be insolvent, a distribution to be made among the creditors in equal degree, *pari passu*. These and many other subordinate powers, though not expressly given, as in the former part of the instrument, must be understood to be included in this power to pay debts; and I take it to be clear that in the construction of such powers

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they are included. Our books say that these kind of authorities are to be pursued strictly; they instance that an authority given to three cannot be executed by a less number than the whole, and the stat. of 21 H. VIII. c. 4, was thought necessary to be made, to remedy the inconvenience arising from it in the case of executors, where some have declined to act. But our books also say, that they are to be so construed as to include all the necessary means of executing them with effect. Thus an authority to receive and recover debts includes a power to arrest. In such a case as the present, which is not that of mere ministerial authority capable of being defined and executed strictly, but a case where the whole care of the administration is delegated by the executrix to the attornies, and all the means of executing the office of executrix put into their hands, I am of opinion that both the particular provisions and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attornies where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion. Assuming then that this authority to pay debts is larger and more comprehensive in its nature, than the words construed very strictly would import, and that it implies authority to make all necessary arrangements which the executrix herself might make, in order to the payment of the debts, I ask, among the arrangements which it may be necessary for an executrix, or for those to whom she has delegated all her authority touching the payment of the testator's debts, to make, is there one more likely to occur, more useful, in many cases more necessary, than that they should ask and obtain from the creditors of the estate time for payment of the debts, when the time given may prevent all the vexation and expense of a struggle for priority? That an executrix herself might make this arrangement, no one can doubt: that it is also necessary that they who are to have all the funds in their hands, who know, and are the only persons who can know within what time those funds can be got in, and [621] who have the whole application of them entrusted to their care, who represent the executrix, and in effect are themselves the executors, should have it in their power to make it, is equally

clear. The consequence of such an arrangement in either case, and indeed in every one of the instances which I before put, would be, that the executrix might by possibility become personally and in her own right chargeable with debts, as she might become chargeable in a variety of other cases expressly within the power of attorney. But upon whatever ground, and by whatever medium, in the instance of postponed debts, this personal charge is produced, the debt still remains a debt due from the estate, and payable out of the assets. Such an arrangement amounts to an admission, that at the expiration of the credit given, there will be assets sufficient to pay the debt, which still remains a charge upon the executrix as executrix, and only becoming eventually a charge upon her in her own right, if it should turn out that by some unforeseen event there should be a failure of assets, or by misconduct a *devastavit* incurred. If we are to argue from the intent of the instrument, to be collected from the particular wording of it, I ask, can it be reasonably doubted, whether this executrix, who trusted the whole of this large estate in the hands and to the care of these attornies, under her personal responsibility for every shilling of the amount of it, if they should fail in the collection or application of it, would have hesitated to commit to their discretion, upon their view of the state of the property, and of the time within which it could be realized, the asking and obtaining from the creditors twenty months further time for the payment of their respective debts? I ask whether the executrix did not mean to throw all the burden of the administration of the effects upon the attornies, and whether there was not a convenient and necessary discretion to be intrusted to them? When it is objected that the authority given is restrained to an authority to pay in her stead as executrix, and "agreeably to the due order and course of law," I answer, that taking these words to amount to a direction to the attornies to pay in a course of administration, they were not meant to control, nor can they control the authority of the attornies in any thing necessary to that payment, in a course of administration. It is perfectly clear, notwithstanding this direction, that they might take time for the payment of the debts having assets to pay them when the time

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came, for then they would pay in a course of administration, and there can be nothing repugnant to that direction in asking for *the time, even though the assets should afterwards fail, because it is a step taken upon a conviction that there will be assets to be administered in a due course of law, and to the end that they may be administered. Where the executrix has entrusted all to the care of her attornies, with a responsibility in herself to the extent of all the property, it is a small circumstance to be observed upon, that though the payment of a debt, not in a course of administration, is within the authority as between the creditor and the executrix, yet that she might be obliged to answer to other creditors as for a *devastavit* in respect of it. In truth, this direction to pay in a course of administration may operate as between her and her attornies, but as against creditors receiving payment of their debts it seems to me that it can have no operation. Much stress was laid in the argument on there being no express power given to the attornies to sign acceptances for the executrix, but the objection proves too much. As well might it be argued, that if the cash of the estate was kept at a banker's, the attornies should not draw for it in her name. The true question appears to me to be, whether the attornies under this power have a discretion to agree with creditors for the forbearance of the debts; and that the rest of the difficulty has more of form than substance in it. If the foundation is well laid, the application of the argument to the particular case in question seems obvious and decisive. The acceptance of this bill of exchange is called a security, but is in substance merely a mode of taking twenty months further time for payment of a debt, due from the testator to these plaintiffs, and payable out of the assets. Had the twenty months credit been taken by a mere agreement to forbear, and she had been sued as executrix after the expiration of the time given, she could not have pleaded *plenè administravit*, because by taking the credit she admitted assets. There is a formal difference only between that case and the present, the acceptance appears upon the face of the bill to be an acceptance by her as executrix, and the consideration of it is value in account with testator. If she is sued in her own name, and not as executrix, she is so sued upon the same

principle upon which assignees of a bankrupt are sued for what they do after they become assignees, for the estate, and at the expense of the estate. The debt is still substantially the debt of the testator, which when paid by her will be carried to the account of the testator's estate. I think she might have been sued as executrix upon this acceptance; but as she could not in that case have availed herself of a plea of *plenè administravit,* [623] it was not necessary so to sue her. In neither case could any defence be made against the demand, and in truth no defence ought to be made, for the creditor who accepts this kind of payment purchases the benefit of it, the estate has had its advantage, and this defendant as executrix has had her advantage of the forbearance. I have hitherto avoided any mention of the particular circumstances of this case, which very strongly imply the knowledge of the defendant and her approbation of the making these acceptances,* but here they ought to have their weight, by way of answer to the suggestion of possible inconvenience which the suffering this verdict to stand might produce. I confess that they appeared to me upon the trial, and do now upon the best consideration that I can give to the case, appear to me to be strong enough to raise an implication of a special procuration, if that were thought necessary, from the executrix to her attornies, to authorize these acceptances, and that the defence now made upon the strict law is against conscience and good faith. I have already taken an opportunity of observing on the case depending in the Court of King's Bench, and what I supposed would be the decision of that Court. I will only now repeat, that we understand that it did not appear in that case, that the acceptance was given for the payment of a debt due from the testator,† the

* There was evidence to show that the defendant knew that Thornton had accepted the bill in question in her name, in payment of the plaintiff's debt; and when the officer served her with process, she acknowledged the justness of the debt, saying that the plaintiff had behaved handsomely, and should be paid. Perhaps therefore the case may rest with greater safety on the ground of a special authority given to accept the particular bill in question, than on the construction of an instrument, which demonstrates on the face of it the intention of the parties, that the power delegated to the procurator should not be extended to make the defendant personally liable.

† In the course of the argument, it was stated that a similar question on the construction of the same letter

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payment of which had been agreed to be postponed, or indeed that it did in any manner touch or concern the execution of this trust, which is the great and distinguishing feature between that case and the present. We agree that this power cannot authorize the giving acceptances in the name of Mrs. Baillie, which are neither expressed nor proved to be in payment of the [624] testator's debts. The case now in judgment in this court rests on its own particular circumstances, upon which we decide.

Rule discharged.

[The letter of attorney is stated at length in the original report in H. Blackstone. It appears, however, sufficient to say that in all its terms the authority given was to act for the executor "as executor." The following is the report of the case in the King's Bench referred to in the notes to the preceding case, being the notes in the original report of H. Blackstone.]

1795.
Feb. 11.
[6 T. R. 591]

GARDNER *v.* BAILLIE.

(6 T. R. 591—593.)

A power of attorney given by an executrix to act for her as executrix does not authorise the accepting of bills of exchange to charge her in her own right, though for debts due from her testator.

THIS was an action on a bill of exchange, drawn by the plaintiff on the 4th of September, 1793, for 793*l.* 7*s.* 9*d.* on the defendant by the name and description of Mrs. C. Baillie, executrix of J. B., accepted by E. Thornton for and on behalf of the defendant, it being averred that Thornton was duly authorised by the defendant to accept the same on her account.

of attorney, was then depending in the Court of King's Bench; and a few days afterwards the CHIEF JUSTICE said that he had been informed, that the question in the case in that Court was, whether the attornies were authorized to give or accept bills generally in the name of the defendant, not being in payment of the debts of the testator? This his lordship was clearly of opinion they could not do, under the letter of attorney, in which he apprehended the Court of King's Bench would concur.

That case is since reported (*Gardner* v. *Baillie, ut supra*), but it is there stated that the bill on which that case arose was drawn and accepted for a debt due to the plaintiff from the testator. *Qu.* therefore, how that fact really was?

At the trial before Lord Kenyon at the sittings after the last term it was proved on behalf of the plaintiff that Thornton, who acted under a letter of attorney from the defendant, *accepted the bill in question, which was drawn and accepted for a debt due to the plaintiff from the defendant's testator; and evidence was offered to prove that the defendant had paid other bills drawn on her by other creditors of J. Baillie and accepted on her account by Thornton who on those occasions also acted under this power of attorney, but Lord KENYON thought the evidence inadmissible. A verdict was taken for the plaintiff for the amount of the bill, with liberty for the defendant to move to set it aside and to enter up a nonsuit, if this Court should be of opinion that the plaintiff ought not to recover. The principal question in the cause was, whether Thornton had power under this letter of attorney to accept bills of exchange for the defendant; because, if he had, the verdict was right. By the letter, after reciting that the defendant had been appointed executrix of J. Baillie, who was entitled to considerable sums of money on mortgage, bonds, bills, notes, unsettled accounts, &c. the defendant appointed Thornton her attorney, as executrix, to ask, demand, sue for, and receive all sums, &c. "which at the time of J. B.'s death were due to him and which were then due to her as executrix;" in her name, as executrix, to adjust and settle all accounts, differences, &c. wherein she, as executrix, was interested; to submit the same to arbitration, (if necessary,) and for that purpose in her name as executrix to execute any bond, &c.; to execute for her and in her name, as executrix, assignments of mortgages, receipts, releases, &c.; for her and in her name as executrix and agreeably to the due course and order of law to pay all debts, &c. due from her as executrix, whether on mortgage, bond, bill, note, or otherwise; and generally for her, as executrix, to do all such further acts for receiving debts and discharging the powers given by the letter of attorney; and giving full power to do and act "touching and concerning all or any of the said premises as effectually to all intents constructions and purposes whatsoever as she, as executrix, could, &c."

A motion was accordingly made to set aside the verdict; and it was argued on a former day by

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Erskine and *Park* for the plaintiff, and

Gibbs, *Chambre*, and *Giles*, for the defendant;

The former contending that, as Thornton was expressly authorised to receive and pay all sums due to and from the defendant, to refer any matters in dispute between her and any other *person to arbitration, and generally to do all further and other lawful and reasonable acts as to him should seem proper, he had power to bind the defendant by accepting the bill in question on her account, it being for a legal debt due from her as executrix. The point relative to the admissibility of the evidence rejected, was not now insisted on.

[*6 T. R. 593]

For the defendant it was argued that the accepting of this bill by Thornton was an excess of his authority not warranted by the power, because it would charge her in her own right, whereas the letter of attorney only authorised Thornton to bind her as executrix, the letter being cautiously drawn with that view.

The COURT said that though they had no doubt about the case, yet as there was a similar cause (said to be) depending in the Court of Common Pleas on the construction of the same letter of attorney, it would be proper not to decide this case until they had had an opportunity of conferring with the judges of that Court on the subject. And on this day,

Lord KENYON, Ch. J. said there was no reason why the Court should any longer suspend their judgment in this case, as they were all clearly of opinion that Thornton had no authority to bind the defendant by accepting the bill of exchange on her account, and consequently that the action could not be maintained. That they had consulted with the judges of the Court of Common Pleas, who authorised him to say that they concurred in this opinion respecting the construction of the letter of attorney, but that there were other circumstances in that case.

Rule absolute.

EXCH. EASTER TERM.

MUSPRAT *v.* GORDON AND UX.

(1 Anstr. 34—36.)

1792. *May* 12.

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A. devised the residue of his property to his wife, in trust, to divide it among their children in such manner as they should deserve. One of the seven children sold her share, and covenanted to make it up a full seventh. This is good; and on a bill for a specific performance, she can make a good conveyance without the mother joining.

THIS case came on upon exceptions to the Deputy Remembrancer's report, upon its being referred to him to enquire whether the defendants could make a good conveyance to the plaintiff.

The defendant Ann was one of the seven children of Lewis Brown deceased, who, upon his death, devised certain estates to his wife, in trust to sell, and after payment of debts, to invest the surplus in government securities for the maintenance of his children while minors, and to divide the residue among them "in such manner as they should deserve." The premises in question were not sold according to the trust, but leased by the widow to the plaintiff, who laid out considerable sums in improving them. Being afterwards threatened by the defendants to be turned out, and finding his title defective, he came to an agreement with them, by which, after reciting the title of the defendants under the will, they, for 320*l.* agreed to convey to the plaintiff all the present interest of the wife in the money to arise from the sale of the premises; and that if the share should not amount to a full seventh of the residuum, they should make it up. The defendant sued at law for the 320*l.* The present bill was brought to have an injunction against proceeding at law, till the conveyances were made out to the plaintiff; and it was accordingly referred *to the Deputy Remembrancer, to see whether the [*35] defendants could make a good title: he reported, that they could not, without the mother's joining in the conveyance. Exceptions being taken to this report;

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Burton and *Stanley*, for the defendants, insisted, that the matter referred was not whether the defendant could make out a good title to the premises or freehold, but to the wife's interest in the money to arise from the sale; and this is a real vested interest, for the widow has the power of unequal division, but not of leaving any child unprovided for. The plaintiff made the agreement with his eyes open, and it recites the whole interest of the wife.—They cited 2 Eq. Ca. Abr. p. 21, ca. 19, 2 P. Wms. 182, 187, S. C. and 1 Vesey, 409, to shew that courts of equity will interfere to decree execution of agreements entered into *bonâ fide* for the purchase of possibilities even more remote than the present.

Richards and *Jones*, on the other side, contended, that this was such a bargain as could not be executed without the mother's conveyance, as otherwise the defendant had no certain interest to convey; it depending entirely upon her, what part, or whether any, would come to Mrs. Gordon; and as the debts were to be first paid, it was a chance whether there would be any surplus to divide; and as the defendant has sued at law for the 320*l.* which he must recover, the agreement being under seal, this Court should interfere, on the same grounds as would have led them to [*36] refuse putting it in *execution, if the defendant had prayed specific performance. General policy is very much against such bargains, as the mother will of course appoint nothing to Mrs. Gordon, when it is not for her own benefit.

CHIEF BARON EYRE:

The same reasons which induce a court of equity not to decree specific performance, will not always lead them to avoid a contract executed, or stop proceedings at law upon it: but this contract is of a nature to be enforced in any shape; for the possibility may be assigned, and there is no appearance of fraud: besides, if the share appointed by the mother is deficient, the defendant is to make it up to a full seventh; which makes it nearly a certainty. The exceptions must be allowed; but without costs, as these bargains are not to be encouraged; and the case referred back to the Deputy Remembrancer, to say, what sort of conveyance should be given.

THE ATTORNEY-GENERAL *v.* THE CAST-PLATE GLASS COMPANY.

1792. *May* 18.

[39]

(1 Anstr. 39—44.)

The 27 Geo. III. c. 28, s. 5, (relating to the taxation of plate-glass), by the word square, means all rectangular figures only.

No evidence of the technical meaning of the word in the trade, can be admitted to explain the statute.

On this information a verdict was found against the defendants, who now moved to set it aside and obtain a new trial, on the ground of misdirection of the judge.

The case turned upon the interpretation of the statute 27 Geo. III. c. 28, whereby it is enacted,

Section 5.—"That in lieu of the duty of excise, now chargeable and payable for or in respect of any materials, or metal, or other preparations made *use of in Great Britain, in the making [*40] of cast-plate glass, there shall be paid to His Majesty, his heirs and successors, at and after the rate of one pound one shilling and fivepence halfpenny per hundred weight for all cast plate glass which shall be made in Great Britain, and which shall be squared into plates of a superficies not less than 1485 inches, and of a thickness according to their superficies as hereinafter mentioned and described."

Section 7.—"And be it further enacted by the authority aforesaid, that all and every maker and makers of cast-plate glass shall, before he, she, or they shall begin to draw any cast-plate glass out of his, her, or their annealing arch, give to the officer of excise, under whose survey such maker or makers shall then be, six hours notice, in writing, within the limits of the chief office of excise in London, and twelve hours notice, in writing, in other places of Great Britain, of his, her, or their intention to draw any cast-plate glass out of his, her, or their annealing arch; and such officer shall attend to see such cast-plate glass drawn out of the annealing arch; and such maker or makers shall immediately, on any such cast-plate glass being so drawn out of the annealing arch in the presence of such officer, proceed to square all such cast-plate glass; and such cast-plate glass, immediately on the same being so squared, shall, together with

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the cullett arising from the squaring thereof, be weighed in the presence of such officer."

*Section 10.—"And be it further enacted by the authority aforesaid, that all and every maker or makers of cast-plate glass, shall break into small pieces, to the satisfaction of the officer of excise under whose survey such maker or makers shall be, immediately upon being requested so to do by such officer, all cast-plate and all cullett which shall not be squared into plates, according to the directions of this act, so as to render such glass and cullett unfit for any purpose but that of remelting; and if any such maker or makers shall neglect or refuse so to do, he, she, or they shall, for each and every such offence, forfeit the sum of fifty pounds."

The five plates in question were made by the defendants, with oval tops, and as this was the shape in which they were intended for sale, they refused to square them, as the officer desired, by making them rectangular; and accordingly this information was filed against them, for the penalties in the tenth section.

The *Attorney-General*, at the trial, produced books explaining the process and terms of art in the manufacture; and the defendants offered evidence to prove, that the technical meaning of the word squaring glass, is the cutting it into the shape in which it is intended for the market, whatever that shape may be; and on this evidence being refused, and a verdict directed and found against the defendants, the present motion was made for a new trial.

Mr. Solicitor-General and *Mr. Newnham*, for the Crown, admitted, that the word square was not to be taken in the strict mathematical sense, but in the common acceptation of it, which includes all rectangular figures. This statute was introduced to favour the cast-plate glass manufacture of this country, so however as not to destroy the blown-plate glass manufacture, which pays a higher duty to government, and is employed principally in glasses of smaller size than those allowed by the section of the above statute, by the other manufacture, and in plates of other shapes than rectangular. The legislature, in giving other

advantages to the cast-plate glass manufactures, has reserved to the blown these branches of the trade, by confining the others to large rectangular plates; for if both came into the market with the same commodity, that which pays the highest duty must be resigned by the contest; accordingly, the legislature has shewn great care (section 10) that all the pieces cut off in squaring, or not squared in the proper manner, shall be broken to prevent their being sold in other sizes and shapes than those allowed; but this would be defeated, if they may be taxed in irregular forms, and sold in other shapes afterwards.

Rous, on the other side, stated, that by the superior waste in this species of the manufacture, it was in fact as highly taxed as the blown, and more expensive; and it was because it was found that this could not possibly be carried on when taxed in the manner the blown is, *i.e.* on the materials, that this Act passed in their favour; and throughout *the whole Act the intention is [*43] to make them pay for the whole weight sold and no more; which is quite unconnected with any particular shape. It is true, it is intended to give them no advantage against the blown-plate manufacture; but they can never interfere, as the cast-plates, of whatever shapes, are confined to sizes which the blown cannot come up to; and there is no danger of their splitting the plates after measurement by the officer, as they lose so much more by diminishing their size, than they can gain: a plate cut in two, not being one-eighth the value it had before. Then we cannot suppose that the legislature ever meant to stop a lucrative branch of manufacture without benefiting any other, or the revenue. If however this is not sufficiently evident as the meaning of the statute, at least evidence should have been admitted, to shew the technical use of the word square. The legislature, speaking of any trade, speaks in the language of that trade, and that can only be found out from those who understand it. This seems to have been admitted, when books treating of the trade were produced to shew the process, and to explain the terms of art; although at the time those books were written, and the term square first used in the trade, the fashion was to have all plates in squares; yet when the fashion has altered, though the term

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remains the same, that cannot bind us to continue the old fashion. As the strict sense of the word square is not contended for, no other standard can be fixed upon but that of the trade, which is only to be discovered by evidence.

EYRE, Chief Baron:

In explaining an Act of Parliament, it is impossible to contend, that evidence should be admitted; for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so, must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer, a judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

I have no doubt in saying, that the legislature used the word "square," not in the strict, but in the common acceptation, confining it to rectangular, but not to equilateral figures. Had they said that the plates should be measured by square inches, the interpretation put upon the statute by the defendants would have been just; for any shape may in measurement be reduced to square inches: but they have said that it shall be squared, which cannot be applied to oval or irregular figures. Whether it would have been more beneficial to have allowed the manufacturer to have used all shapes, is not a question for a court of law.

The other Barons being of the same opinion,

The rule was discharged.

EXCH. Sittings after TRINITY TERM.

SMITH and Others *v.* BROCKLESBY.

(1 Anstr. 61—62.)

1792. *June* 11.

[61]

Where there are costs in equity and at law due from the opposite parties, the Court will not set off the costs at law against those in equity if the solicitor in equity claims his lien on the latter.

There being accounts between the plaintiffs and the defendant, and an action at law brought by the defendant in equity for the balance; the plaintiffs filed a bill for a discovery in this Court, which they obtained, and of course became liable to pay costs.—They had a judgment at law afterwards in their favour, and they therefore became entitled to costs there. The defendant becoming bankrupt it was moved by the *Solicitor-General*, that the costs at law might be set off against those in equity; and only the balance be the demand on either side.

This was opposed by *Partridge*, on behalf of the attorney for the defendant, insisting that he had a lien on the costs in equity for his demand in that suit; and cited the case *Mitchell* v. *Oldfield*, 4 Term Reports, 123† accordingly.

The *Solicitor-General* attempted to distinguish this case from that; for in the case of *Mitchell* v. *Oldfield*, *the suits in which [*62] the costs were attempted to be set off, were so distinct that they were even between different parties; but here it is to be considered as all in the same cause, the discovery here being for the purpose of prevailing in the suit at law, and the occasion of success there.

By the Court:

This is not like the case where the cause at law is directed by this Court; here they are distinct causes, and although we might have granted this motion as between the plaintiffs and the defendant himself, or his assignees; yet when his attorney, a third person, becomes interested, it is otherwise.

† 2 R. R. 342.

1792.
July 13.

[67]

ATKINSON, Clk., *v.* FOLKES, Bart., and Others.

(1 Anstr. 67—75.)

A rector having come to an agreement with his parishioners for a composition for tithes, cannot bring a suit in equity for an account of tithes, and in that suit set up his own non-residence as making the agreement invalid under 13 Eliz. c. 20, and 14 Eliz. c. 11, s. 15.

This suit was brought by the plaintiff as rector of the parish of Stillington in Norfolk, against the defendants, occupiers of lands there, for an account of tithes from Michaelmas, 1785.

The plaintiff, from the time of his becoming rector in July, 1782, till Michaelmas, 1784, received from the defendants and other parishioners a composition in lieu of tithes, but no written [*68] contract *had been entered into. At that time he entered into a written agreement with all the occupiers of land within the parish, by which it was settled, that the composition should be advanced 30*l.* a year in the whole, from Michaelmas, 1784, for 21 years; to be paid by the parishioners in the proportions thereby ascertained: and that proper articles of agreement for that purpose should be made out and executed by all parties concerned. No further agreement was ever entered into, although a draught was prepared and sent by some of the defendants to the plaintiff for that purpose at his request. The plaintiff received the augmented composition up to Michaelmas, 1785; but refused to receive any, subsequent to that time, when tendered by the defendants, on the ground of his having been resident at a distance from his parish for more than 80 days in one year, between Michaelmas, 1784, and Michaelmas 1785, and having given them notice to set out tithes in kind from that time. The defendants insisted that the plaintiff could not set up his own non-residence to avoid his agreement.

Burton, *Hollist*, and *Plumer*, for the plaintiff:

The rector is, of common right, entitled to have tithes in kind, and if they are not set out, to come into this Court for an account, unless the defendant can shew that he is bound by valid subsisting agreement to take a composition. The agreement of 1784 is avoided by the subsequent non-residence of the plaintiff,

in whatever light it may be viewed. If it is to be considered as a lease, it is declared void by the statute 13 Eliz. c. 20; if only an agreement, *it is within the 14 Eliz. c. 11, s. 15; and as an annual composition, it is determined by the notice. [*69]

Those statutes declare all leases in the situation of the present, not merely voidable, but absolutely void; and it has been so held in many cases. *Shepherd* v. *Twoulsie*, 1 Bulst. 111; *Webb* v. *Hargrave*, Moore 641; *Jennings* v. *Haithwaite*, Yelv. 106; *Doe* ex dem. *Crisp* v. *Barber*, 2 Term Rep. 749.† Therefore whenever the fact of non-residence for 80 days is proved, the Court will annex the legal consequence of that fact, as upon felony, or an act of bankruptcy being found, whatever party may happen to be benefited by it.

The distinction is, that where any avoidance is created in favour of an individual; as where a lease by the predecessor for more than 21 years is declared void, for the benefit of the successor, there the party who made the lease is estopped from impeaching its validity. But where the avoidance is inflicted as a penalty, upon proceedings contrary to public policy, a *particeps criminis* may avail himself of it; as in cases of usurious contracts, gaming transactions, marriage brokage bonds, &c. And in these cases, equity will assist the complainant whose case happens to be interwoven with the rule of public policy, although he himself is not otherwise entitled to its assistance.

The statute 13 Eliz. is made for the purpose of compelling residence of clergymen. For this end it employs two different expedients: 1st, a pecuniary *penalty on the clergyman himself; [*70] 2ndly, the penalty of avoidance, operating against the lessee of his benefice as well as himself; and therefore making it his interest to watch that the clergyman shall perform his duty to the public. This statute, however, only reaching actual leases, contrivances were soon found out to evade it, by resorting to less solemn contracts, to supply the place of leases. To remedy this evil, the statute 14 Eliz. extends to all "contracts, &c. for suffering or permitting any person to enjoy any benefice, &c. or to take profits or fruits thereof," which the contract of 1784 clearly is.

† 1 R. R. 611.

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The intent of the Legislature in these statutes is not to consult the interest of the landholders, but that the people may be instructed in morality and religion. This public end will be equally defeated by whatever mode it may be contrived that others shall enjoy the profits of the benefice, and remit a rent to the clergyman, without his being obliged to reside, for collecting the fruits and performing the duty. A demise to a single lessee, is not so dangerous, in the view of public policy, as a contract like the present, by which all the occupiers of land in the parish are united in interest with the clergyman, to wink at his non-esidence and defeat the intention of the Legislature.

It seems more particularly to have been intended, that the incumbent should be allowed to take advantage of the avoidance; for the Act recites the mischief to be remedied to be, "that the [71] livings appointed for ecclesiastical persons may not, by *corrupt and indirect dealings, be transferred to other uses." So that the interest of the church is particularly meant to be guarded.

If the plaintiff had sued for the composition, there is no doubt that he would have been barred by the statute 14 Eliz. Then if he cannot sue for tithes in kind, he has no remedy whatever, and must totally lose the profits of his benefice, which it will be admitted never was the intention of the law. If the plaintiff was legally entitled to tithes in kind, the defendants having neglected to set them out, he must have an account in this Court, whatever may have been the origin of his legal claim.

Partridge, *Graham*, and *Ainge*, for the defendants:

The statutes 13 & 14 Eliz. do not affect the agreement between the parties; for it was only an executory contract. If formal articles had actually been executed, there might have been a question, whether they come within the statutes; but it clearly was not the intention that this writing, of Michaelmas, 1784, should remain as the effectual contract between them; and therefore equity will not execute it, so as to bring innocent parties within a penalty; but will consider it as still executory and binding.

Even if executed, it would not come within these statutes. The Legislature have there in view three descriptions of

persons, the parson, the lessee of his benefice, and the parishioners. The provisions were intended for the benefit of the latter; part of the evil to be remedied being, that the *farmers were harassed by lay lessees, strangers to them. The end aimed at is, that the living may not be transferred to other uses.—But here is no transfer, no third person substituted in the place of the minister, but only another mode adopted for his receiving the same value. [*72]

The 13 Eliz. avoids all leases of the benefices. The 14 Eliz. was made to include "all agreements, which in law are not taken to be leases, although in fact they amount to as much;" plainly meaning those agreements only which are in the nature of leases. But an agreement, that the occupiers shall retain their tithes and pay a composition, is not a lease, nor in the nature of a lease; but rather in the nature of an extinguishment, or of an annual sale of the tithes. All leases, whether legal or equitable, make the lessee rateable to the poor; but on a composition for tithes, the parson remains rateable, and not the occupier who retains the tithes. 16 Vin. 427, ca. 7.

An agreement that the occupiers shall retain their tithes, cannot be meant to be included in the penal part of these statutes; for the 18 Eliz. c. 11, a statute in *pari materia*, in case of the breach of the former provisions, authorizes the occupiers to retain their tithes; which would be to affirm this agreement, instead of dissolving it.

But even if this agreement does come within the statute, yet the parson himself cannot take advantage of it, so as to profit by his own wrong. *For though the statute says, that such leases [*73] shall be void, yet that is often understood in a limited sense; as where leases by tenants in tail, beyond twenty-one years, are declared to be wholly null and void to all intents and purposes, yet the lessor himself cannot take advantage of that avoidance. All the cases upon the present subject, are of the parishioners, or others not privy to the unlawful act, taking advantage of it.

Agreements with the parishioners, tend to the honour and peace of the church, and the benefit of all parties; but they never can be entered into, if binding on the parishioner, and liable to be dissolved by the parson at pleasure. Such a privilege

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in him would generally be a high temptation to non-residence, which the statutes mean to guard against. In a Court of Equity it is a general rule, that a party must do equity before he can seek it. The plaintiff rests on his having broken the law, as freeing him from his fair contracts, and expects this Court to assist his unconscientious claim in the first instance, before having even attempted to establish it at law.

The cause stood over to this day, when the opinion of the Court was delivered by

HOTHAM, Baron:

The plaintiff, in this case, sues for tithes in kind, resting on his own non-residence of more than 80 days, as avoiding the composition. The defendants insist upon that agreement as still subsisting and valid; and for them two points have been made.

[74] First, that the plaintiff is not to be allowed to come into a Court of Equity to set aside, by his own illegal act, an agreement fairly entered into.

Secondly, that the agreement in question is not a lease or agreement within the meaning of the 13 & 14 Eliz.

As to the first point, it is a general and very old rule, that a plaintiff must come into this Court with clean hands; and this is more particularly the case with a clergyman coming here, whom we will neither countenance in the breach of a positive statute, nor in the neglect of his religious duties.

In answer to this general rule, it has been insisted, on behalf of the plaintiff, that equity does relieve in many cases, where the party suing is *particeps criminis*, as in marriage brokage bonds, and other transactions against public policy; although there the relief is only in equity, whereas these statutes avoid the agreement at law also.

Cases have also been cited to shew that the parson himself has been allowed to take advantage of these statutes, to avoid his own lease; particularly the case of *Webb* v. *Hargrave*, Moor, 641, and the case in Yelverton; but these very little resemble the present.

In the case before us, there seems to be no room for doubt.

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[*75]

The plaintiff is attempting to pervert the plain intent of an Act of Parliament, so as to get rid of a disadvantageous contract by his own illegal *conduct; and the question is not whether he can ultimately succeed in this attempt. The common law is open to him, or he may sue for his tithes in the Ecclesiastical Court; but a Court of Equity cannot interfere in aid of his unconscientious proceedings.

This being the preliminary part of the clause, it becomes unnecessary for us to consider the second question, whether the present agreement comes within the true construction of the 13 & 14 Eliz.; although, if it were necessary to enter into that question, there does not appear to enter into that doubt or difficulty in it.† But we do not mean to decide upon that point, as the plaintiff fails before bringing his case that length. The bill must be

Dismissed with costs.

EXCH. MICHAELMAS TERM.

LYFORD *v.* TYRREL.

(1 Anstr. 85.)

1792. *Nov.* 23.

Arrest upon Monday following upon a forcible detention on Sunday, is void as an arrest upon Sunday.

A RULE had been obtained on a former day by *Plumer*, to shew cause why the defendant should not be discharged out of custody on filing common bail, on affidavits stating that the defendant came to the plaintiff's house on a Sunday, when the plaintiff secured his person in the house, and detained him there till next morning, and then brought a sheriff's officer to arrest him on a *Quo minus* for 500*l.* for which he is still in custody.

Laws this day shewed cause, upon affidavits of the defendant's having on the Monday, at the time of his arrest, agreed to waive every benefit of the forcible detention, upon conditions which he contended that the plaintiff had performed.

† *Sic* in Anstr.

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By the COURT:

We cannot distinguish this from an arrest upon Sunday, which is purely void; and no subsequent consent of the defendant can make it good.

The rule was made absolute.

1792. Nov. 28 (?).

DOE ON DEM. DUPLEIX AND OTHERS *v.* ROE.

(1 Anstr. 86—92.)

A trust consisting of 25 persons, who are to proceed to elect new trustees, so as to fill up their number, when they shall be reduced to 15, may elect before that time.

A majority of trustees may bring actions in the name of the whole.

Neither a tenant in common nor any other can be admitted a defendant in ejectment without confessing lease, entry, and *ouster*.

THIS was an ejectment brought in the names of the trustees of the chapel and the followers of the late Mr. John Wesley. The trust deed, under which the trustees derived their title, was a conveyance to Mr. Wesley and 24 others, for the purposes therein mentioned, with a clause, "that when, by death or otherwise, the number of the said trustees should be reduced to 15, then the said remaining 15 trustees, or the majority of them, or the survivors or survivor of them, shall proceed to elect, &c." so as to make up the complement of 25, and to convey to the whole body so completed. There was no clause in the deed empowering the majority to bind the whole, in bringing actions in their joint [*87] names. It appeared, on affidavits, that *by the deaths of Mr. Wesley and seven others of the trustees, the number had been reduced to 17. It was then proposed to fill up the vacancies, and accordingly, at a meeting of the trustees, eight new trustees were elected by the majority. Five of the trustees, of whom Dewey the treasurer was one, refused to concur; but the other twelve conveyed the interest of the old trustees to the whole body, composed of the old and the new. The other five resisted these proceedings; and the door-keeper, who had the key of the chapel, and the other servants of the trust, (the lecturer, librarian, &c.) who had apartments in the premises, taking part with these five, kept possession of the premises under their authority, and con-

tinued to account with Dewey for the emoluments, although the other trustees had in the mean time appointed another receiver. There being great animosities on both sides, at a meeting of the trustees, (which consisted of the eight new members, and the twelve who appointed them, the other five not attending,) it was resolved by a majority, that ejectment should be brought against the persons so holding possession. This action was accordingly brought upon several demises, among which was one from the 17 remaining old trustees, and another from the whole augmented number. The dissenting five, never having agreed that their names should be made use of, had on a former day, upon affidavits of these facts, obtained a rule to shew cause,

First, Why the names of the said five trustees should not be struck out of the declaration.

Second, Why they should not be admitted defendants without being obliged to confess ouster; only confessing lease and entry. [88]

Cause was this day shewn by *Piggot*, *Law*, and *Gibbs*, on the ground that the election was according to the intent of the trust deed, and therefore this action was the act of the body; but at any rate, there having been a majority of the old trustees present at the meeting where the action was agreed upon, it was the act of the majority of the trustees, whether the new trustees be considered as having votes or not; and therefore, this being the act of the whole trustees, on behalf of the trust, to perfect which, the names of all trustees are necessary, it would be such a breach of trust in them to withhold the benefit of their names, as the Court will not permit. In a case this term in the King's Bench, *Doe* on dem. *Crafter* and another *v.* ——— it was moved, on behalf of Crafter, that his name might be struck out; but on its appearing that he was only a nominal party, having assigned all his interest to the other lessor, the Court refused to strike out his name, saying, they would not permit such an evasion of justice. So, if the obligee of a bond assigns, he is bound to lend his name to the assignee in an action upon it; and if he releases to the obligor, the courts of law avoid the release as against conscience. And as the other trustees indemnify them as to costs, that can be no objection. The second motion depends upon the

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DUPLEIX
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[89]

first; for it is clear, if they are forced to lend their names to the plaintiffs, they cannot also lend them to the defendants.

Plumer, Marriott, and *Laws, contrà* :

These five trustees being tenants in common with the others, are at liberty to defend for at least their five undivided parts; and therefore to have the second part of the rule; for as they would be subject to the costs of this action, if it were proved that they have actually ousted the other trustees, it cannot be desired that they should confess ouster, which would conclude them as to that fact, *Oates* on dem. *Wigfall* v. *Brydon*, 3 Burr. 1897; and all the books of practice accordingly hold, that a tenant in common may defend without confessing ouster. Then, if they can be defendants, it follows, that the first part of the rule must also be granted, as they cannot be both plaintiffs and defendants.

The majority of a body of tenants in common cannot bind the rest by bringing an action in their name; when the majority of a body of tenants in common in trust, wish to do so, and the rest refuse to join, it is their duty to resort to a Court of Equity for directions as to the management of the trust; and accordingly these bills are common, while there is no instance produced of their names being used in suits without such direction of a Court of Equity. The cases cited are of trustees who have no interest remaining in them, nor disputed claim, as here; there is no instance of a co-trustee being forced by the others to join. The offer of indemnity from costs is a proof that they have no right to use the names of these plaintiffs; for if they had a right, they might do it without any indemnity.

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It does not appear by the affidavit, that there was a majority of the old trustees consenting to the bringing this action; for it states, that the meeting consisted of the aggregate body of the 12 old trustees and the new, and a majority resolved upon this measure, which may have happened although a majority of the old members opposed it. And no subsequent assent will ratify the act, as if it had been originally the act of the major part of the old trustees; and even if there appeared to have been a majority of them consenting, yet the presence and example of the

new members may have led them to this measure; and it is impossible to say how they would have acted if the others had not been among them acting as members of their body. Then this action cannot be said to have been instituted by the trustees acting as a body, unless these new trustees had a right to vote among them, and were duly elected.

This depends upon the words of the trust deed; for as they could not have filled up their numbers at all without a prvoision for that purpose in the deed of trust, this, like other powers, must be exercised according to the restrictions with which it is given. By the deed it is provided, that when they are reduced to 15, they, or the survivors or survivor of them, shall elect. If the period of their being reduced to the number of 15 means any thing, it is to prevent any election till then; for after they are once so reduced, they are to fill up the original number, even if they should neglect to do so till only one remain. And there is a good reason why they should be prevented from electing *till that period, viz. to save the expense of a separate election and conveyance on every vacancy. [*91]

EYRE, Chief Baron:

Upon the whole scope of this instrument it rather appears, that the trustees have not exceeded their powers in electing these new members into their body; for the general intention of the trust deed clearly is, that there shall be a succession of trustees on the death of those originally created; and the period of their being reduced to fifteen, is that at which they are compellable to fill up their numbers, not but what they may do it sooner.

But at any rate, this action is brought by the trustees *de facto*, and even by a majority of the old; so that if the minority dispute their proceedings, it is for them to bring a bill in equity to have the real intention of the trust deed executed. The trust cannot in the mean time be dormant and neglected, until a suit in equity shall be brought by some of the parties and determined. If the tenants in possession can avail themselves of the authority given them by the five trustees, they will not be precluded by this decision; and they will then have an opportunity to question the right of the new trustees, if their claim is set up at the trial.

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The claim of the five trustees to hold their shares of the trust, is admitted by the action being in their names jointly; therefore they need not be admitted defendants to secure that claim.

As to the second motion, it is over-ruled in discharging the first; for if they continue plaintiffs, they cannot be defendants also.

At any rate, however, the latter part of the rule could not have been granted; the ouster, which is the gist of the action of ejectment, is the ouster of the nominal plaintiff, which cannot by possibility be proved at the trial; and therefore if we allow any one to defend without confessing ouster, the plaintiff must be nonsuited. I am astonished any judge should ever have entertained an idea, that ejectment could be maintained without ouster confessed; and if the case in Burrow amounts to that, I cannot admit its authority. The same effect may be attained between tenants in common, where there is no actual ouster admitted, by confessing it under a special order of the Court that it shall be without prejudice.

The other Barons being of the same opinion, it was ordered that both rules be discharged, on the five trustees on whose behalf they were obtained, being indemnified by the rest as to costs.

EXCH. SITTINGS AFTER MICHAELMAS TERM.

1792.
Dec. 12.
[94]

THORNTON *v.* PROCTOR.

(1 Anstr. 94—96.)

At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expense of entertainments, (which were necessary in the trade,) fell upon the other. They ought to have agreed for an allowance; the Court can make none.

The accounts having been annually balanced without such allowance, is conclusive.

THE plaintiff and the defendant became partners in the wine trade in 1781: articles were then entered into, by which all profits and all expenditures were to be equally shared. At that time they both lived in the house where the business was carried

on; but at the end of nine months, the defendant went and resided in another. The plaintiff, from that time till the dissolution in 1790, managed the whole business, and was at considerable expense in treating the customers, which was found to be necessary in that trade. The plaintiff had kept a cash account of all profits and expenses, and struck a balance every year. In such accounts there was no charge for entertaining customers. There was no proof of the plaintiff having ever, during the partnership, demanded any allowance on that ground. The plaintiff proved that 50*l.* per annum would be a reasonable allowance to him for such expenses in entertainments, and that such an allowance was usual in the trade; and it was admitted that an article of that nature is commonly inserted in the agreement of co-partnership.

On reference to the Master, to take an account, &c. making all just allowances between the parties, *and if any account settled, to [*95] proceed on the fact of that account, &c. the Master allowed the plaintiff the 50*l.* a year for entertainments of customers. Exceptions to this report being taken by *Burton* and *Simeon*,

Richards and *Alexander*, for the report, argued, that the original intention having been that they should both reside on the premises, and jointly support the expense of entertaining their customers, the want of a provision in the articles of agreement for such a circumstance as the one removing to a distance, cannot prejudice. Upon that new circumstance arising, it became reasonable for the plaintiff to have such allowance, he being now subject to the whole expense, contrary to the original intention; and the defendant continuing to reap the profit of it without taking a share of the burthen. Yet the defendant not having agreed that such an allowance should be made him, he had no right to insert such an article in the cash account, or credit himself with it in striking the annual balance; which balance therefore relates to other matters only, and cannot conclude as to this.

But the COURT held, that there being no universal custom in the trade to make such an allowance to the acting partner, and it being, on the contrary, the common practice to insert such a

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[*96]

clause in the agreement where it is intended to be made, this should have been inserted in the original articles of co-partnership, or made the subject of a *fresh agreement, if it arose subsequent; and there being no such agreement, the Court cannot make one.

If the plaintiff is entitled to any such allowance at all, he must claim it as being a gross article of expenditure for the co-partnership, and therefore it should have been included in the account; and the plaintiff having struck a balance yearly without any such article in it, shall be concluded thereby.

The exception was allowed.

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Dec. 12.
[96]

RUSSEL *v.* SMITHIES.

(1 Anstr. 96—97.)

A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse.

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take an account what the mortgagee had received from the rents, &c. or might have received, without wilful neglect in her. It appeared that the premises (malt-houses, &c.) had been allowed to fall so much out of repair, that the rent fell from 22*l.* to 18*l.* Plaintiff had done some repairs, and had held forty years.

Graham and *Stanley* argued, that the mortgagee in possession being only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner, 2 Vern. 392; 3 Atk. 518; and that *the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

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By the Court:

The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after forty years possession, the mortgagee is bound to leave the premises in as good condition as he found them.

PISTOR *v.* DUNBAR.

(1 Anstr. 107—108.)

1792. *Dec.* 15.

[107]

A testator directs that the business shall be carried on by E. P. The executors permit E. P. to get in the outstanding debts. There being no such direction in the will, the executors are liable.

THIS cause came on upon exceptions to the Master's report. It was a bill by the residuary legatee against the executor. The will directed that one Edward Pistor should carry on his business to a given day, for the benefit of his estate. The executors, from the confidence thus reposed in E. P. by the testator, permitted him to get in debts due to the testator to the amount of 240*l.*: he not paying this money over to the executors, was taken in execution at their suit; in taking the account, the Master refused to charge the executors with this sum.

Partridge and *Johnson*, for the plaintiff, contended that this was to be charged upon the executors, for E. P. not being directed by the will to call in the debts, has acted in that only as agent for the executors: and if one enables his co-executor to get in a debt, or collect assets of the testator, they are both liable, 2 Bro. Ch. R. 114, *Saddler* v. *Hobbs;* much more so in the case of a stranger. Here the defendants having taken E. P. in execution for the debt at their own suit, (in which they must have sued in their own names, and not as executors) have thereby received satisfaction for the debt. Thus, in *Chilton* v. *Whiffen*, 3 Wils. 13, one who had accepted bills for another, and had not paid the debt, but had been taken in execution for it, was allowed to recover the amount against the principal *on the ground that his body being taken in execution was a payment of the debt. [108]

Burton and *Scafe*, on the other side, argued, that the direction of the testator, that E. P. should carry on the trade, implied that he should collect the debts in it, and that the executors could never be personally answerable for putting the same confidence in him, which the testator himself had done; but are only liable for such negligence as a man would not have been guilty of in managing his own concerns;

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and if the executors here are liable, as having E. P. in execution, then every executor who uses this sort of diligence to compel payment of debts due to the estate of the testator, is answerable for the amount as if actually received.

The COURT said, that if there had appeared the slightest presumption in the will that the testator intended that E. P. should collect the debts due before his death, they would have held the executors discharged, as they appeared to have acted *bonâ fide;* but as there was no such intention hinted at in the will, the executors must answer for this money as received by their agent.

The exception was allowed.

1792.
Dec. 15.
[109]

HARDWICK *v.* MYND.

(1 Anstr. 109—114.)

Devise for payment of debts; the trustees convey to A. B. for the purposes of the trust; A. B. mortgages to several persons who have notice of the trust; these mortgages are good.

Devisees in trust to sell for payment of debts, assign to the son of the devisor, the creditors receive the interest from him for eleven years, and agree with him for an increase of interest on their debts; the original trustees continue liable.

A mortgagee takes a bond from the assignee of the devisee for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage.

The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time; they lie by for 11 years, and the estate is wasted: yet the legatees shall refund.

WILLIAM MYND, the testator, by his will left considerable estates to his son and heir William Mynd, charged with certain legacies to his daughters; he left other estates to George Mynd and John Roberts, in trust, for payment of his debts, and appointed them his executors. George Mynd and John Roberts renounced the executorship, and conveyed their interest in the freehold estates to the son, subject to the trust; the son, William Mynd, got possession of the personal property also, but without taking out administration. He paid some trifling legacies left by his father's will; mortgaged the greatest part of the trust estate

for his own debts: and, in about eleven years after his father's death, became bankrupt.

The creditors of the testator filed this bill for satisfaction of their demands; and various questions arose in the discussion of the cause.

It was argued by *Burton* and *King* for the plaintiffs; *Selwyn* and *Hollist* for the defendants George Mynd and John Roberts, the trustees; *Mansfield* and *Stratford* for several defendants, mortgagees; *Plumer* for the defendant Mrs. Skinner, a mortgagee; *Le Mesurier* for the daughters of the testator, legatees.

The first question was, whether the mortgages and alienations by William Mynd the son, of the *property demised for payment of debts, were good against the creditors? It was admitted, that the most considerable mortgagees took with notice of the situation of the property. [*110]

For the plaintiffs it was argued, that this was a mere trust in William Mynd the bankrupt, and that the purchasers were bound to see to the application of the purchase money, *Sir John Cotterel* v. *Sergeant Hampton*, 2 Vern. 5; *Crane* v. *Drake*, 2 Vern. 616; and the bankrupt is not to be considered as a devisee in trust to sell; he is the agent of the devisee; he takes with a limited authority, and is in a similar situation with the vendors in the cases cited.

On the other side it was insisted, for the mortgagees, that William Mynd the son was substituted in place of the trustees; that his sales were good, and the purchaser not bound to see to the appropriation of the money. *Meade* v. *Lord Orrery*, 3 Atk. 240; *Nugent* v. *Gifford*, 1 Atk. 463.

EYRE, Chief Baron:

If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them; for they have assigned their whole interest to William Mynd to act for them in the trust.

The next question was, whether the trustees were liable to

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make good the deficiency arising from the misapplication of this fund? They insisted that the creditors, by lying by for eleven years, during which they treated with William *Mynd the son, as their debtor, and knew of the assignment to him, had acquiesced in that assignment, and virtually agreed to discharge the trustees. *Elliot* v. *Merryman*, 2 Atk. 42. Some of them also came to an agreement with him during that time, by which he agreed to pay them five per cent. interest on their debts, instead of four per cent. which they formerly carried, and the creditors for several years accepted this augmented interest. This they argued to be a change of the security, and of the nature of the debt, and within the rule laid down in *Elliot* v. *Merryman*.

The COURT held the trustees liable to make good the whole deficiency arising from the misapplication of the fund. They mentioned the case of *Burt* v. *Dennet*, 2 Bro. Ch. R. 225, as similar.

Mrs. Skinner, a mortgagee upon the trust premises, under a title prior to the devise, having a great arrear of interest due upon her mortgage, in 1778 accepted a bond from William Mynd the bankrupt, for the payment thereof with interest, and at the same time indorsed upon the mortgage deed a receipt of the interest up to that time. The bond remained unpaid at the time of the bankruptcy.

The plaintiffs rested on this receipt, and insisted, that by accepting the bond, which was to carry interest, the mortgagee had waived her prior security under the mortgage; upon which this sum being interest, would not have carried interest as upon
[*112] the bond. It was at the time a beneficial *agreement, which she consented to receive as satisfaction of the interest then due.

Plumer, for Mrs. Skinner, argued, that the debt continued to be secured on the estate, notwithstanding the bond, which was to be considered only as a security. The receipt would be evidence of payment, if it were not proved and admitted that the only consideration actually received for it was this bond, which

could not be held to be satisfaction till discharged. The bond of the son was only as a surety. *Evelyn* v. *Evelyn*, 2 P. Wms. 664, and the cases there referred to in Mr. Cox's note.

He also argued, that this bond should be tacked to the mortgage, and carry interest against the estate.

The COURT held, that the mortgagee was entitled to interest on the mortgage notwithstanding the indorsement.

The creditors claimed, that the legatees who had been paid should refund. This was opposed on the ground of laches in them, as they might have obtained payment of their whole demands if they had claimed from W. Mynd in proper time. It is found that the personality wasted by him, and the real estate devised for payment of debts were more than sufficient for that purpose. The legatees have used proper diligence as to their own demands; they had no method of compelling the plaintiffs to sue for theirs, and therefore ought not to be prejudiced by their laches.

The COURT decreed, that the creditors should be paid the amount out of the legacies received by the legatees, on failure of the other funds. [113]

The daughters of the testator also insisted on the laches of the specialty creditors, as preventing them from coming on the estates devised to the son, upon which their legacies were charged.

The COURT held that those estates continued liable to the demand of the creditors. * * *

EXCH. HILARY TERM.

1793. *Jan.* 31.

[116]

ATTORNEY-GENERAL *v.* FOYSTER AND OTHERS.

(1 Anstr. 116—123.)

Trustees of copyholds in trust for repairing the church of A. and chapel of B. in that parish, by desire of the parishioners bought new ground and built a new chapel, the old being too small and in ruins: this was held not a deviation from the trust, and the trustees were allowed to apply the rents and savings toward it, but not to mortgage the estate.

THE charity upon which this information was brought consisted of copyhold lands in the manor of Tottenham. The original deed declaring the uses is not extant, and these are only known by the entry of the surrender of each respective set of trustees to their successors: the oldest of which, in the 28th year of Ch. II. is by a surviving trustee to his successors—"to the use of the parish church of Saint Pancras, and the chapel of ease thereunto belonging, and to the special intent and confidence that the rents and profits may be laid out to the use of the parish church of Saint Pancras and chapel aforesaid, in repairing the same." Other surrenders are to the same effect: "to the intent that the rents and profits of the same shall be laid out in repairing the said church and chapel of ease to the same belonging," &c. and admissions of succeeding trustees to the same effect; and one surrender was in these words: "To the use and behalf of the parish church and chapel thereto belonging, in and about repairing the same, and otherwise for the benefit thereof."

In 1779, the trustees found the chapel so ruinous as to be no longer capable of being repaired; they therefore called a vestry of the parishioners, at which it was agreed to build a new chapel, and to buy a piece of ground for that purpose. At this time there was an accumulation of rents of the estate, to the amount of 678*l.* mostly vested in the South *Sea Annuities. The trustees bought a new situation, and built the present chapel, which was much larger than the former; that part of the parish

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in which the chapel stands (Kentish Town) being much increased in population.

The whole expense incurred, amounted to about 2,670*l.*; to defray which the trustees had expended the former savings, and had sold the old chapel and the ground of it, and let out the seats and pews in the new, (whereas the old was open to all the parishioners,) and were in treaty to mortgage the trust premises, in order to reimburse themselves for the money they were out of pocket, and to finish the chapel, which was not yet quite fitted up within.

In all these transactions, the trustees acted by the direction of the inhabitants assembled in vestry, and appeared to have conducted themselves with great integrity and zeal for the good of the parish.

The present information was at the relation of four of five of the parishioners; and prayed an account of the trust, and that the defendants might be decreed to replace the South Sea Stock and other savings which they had so expended; and that it might be declared, that the future rents are not liable to any of the debts incurred by these transactions, or to replace the money expended by the trustees therein; and that they might be enjoined from raising money on the premises by fines for long leases, or by mortgages, or otherwise.

This cause was argued in last Easter Term, by the *Attorney-General*, the *Solicitor-General*, and *Johnson*, for the information; and by *Burton*, *Richards*, and *Jones*, for the defendants. [118]

For the plaintiff it was argued, that this estate is limited in its application, to the periodical repairs of the church and chapel, and from which uses the parish are not at liberty to deviate. *Attorney - General* v. *Bishop of Oxford*, 1 Bro. Ch. R. 444 n; *Attorney-General* v. *Margaret and Regius Professors, Cambridge*, 1 Vernon 55; *Ex parte Bolton School*, 2 Bro. Ch. R. 662.
* * *

If circumstances render the original intention of the trust impossible to be complied with, the deviation should be as little as possible: and if rebuilding became absolutely necessary, it should have been on the old spot. This doctrine of *cy pres* is

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recognized in the case of *Foy* v. *Foy*, cited in 3 Bro. Ch. R. 591. The buying ground and *building is held so different from any repairs, that a bequest for the latter is good, notwithstanding the Mortmain Act, *Vaughan* v. *Farrer*, 2 Ves. 182; but the former is bad, *Attorney-General* v. *Bowles*, 3 Atk. 806; *Attorney-General* v. *Nash*, 3 Bro. R. 589; and *Attorney-General* v. *Tindall* Amb. 614.

The agreement of the parish could not give authority to squander more than the growing rents. * * *

For the defendants it was argued, that the general design of the charity is for accommodation of the parishioners, in the church and chapel; and when that accommodation cannot be attained by repairs, as must at some time or other happen in all buildings, it impliedly authorizes rebuilding. If the trustees, [*120] finding that the state of the chapel *prevented their applying the rents to the express purpose of repairs, had come to a court of equity for directions, the Court would have decreed exactly what the trustees have done; and although the want of such authority might have been a reason for an injunction against their proceeding in the building, it can be no reason for punishing them now when it is done. *Attorney-General* v. *Green*, 2 Bro. Ch. R. 492. * * *

EYRE, Chief Baron:

This case has been argued as if the church and chapel were originally built from this fund; but on the contrary, both must have been in existence before the bequest to repair them. The keeping them up is therefore a burthen on the parish, independent of the charity; and there can be no necessity to infringe on the principal sum by mortgage or otherwise for that purpose.

The trustees have acted, in the rebuilding, by order of the parish and as their agents, and not by their own authority as trustees.

[*121] The vestry and the trustees have acted as the Court probably would, upon application to them have directed. The trust to repair becoming impossible in its application, the applying the growing rents and savings to the purpose of a building by

direction of the parishioners, cannot be objected to: rebuilding is included in a covenant to repair and uphold; and comes as near as possible to the express intent. *Attorney-General* v. *Harrow School*, 2 Ves. 551, is in point to this, and also to the circumstance of the fund, applicable to repair both church and chapel, being applied to the chapel alone.

The purchasing and exchanging lands, letting the pews, and selling the old materials, are all foreign to this information; in these the trustees acted as agents for the parish, without relation to the charity at all. It is impossible for the trustees to cover the whole expenditure out of the trust, because they cannot break in upon the fund destined to be applied, as repairs are wanting from time to time.

HOTHAM, Baron:

I agree that that only can fall upon the funds of the charity, which comes in the place of repairs, to wit, the rebuilding, which I never had any doubt comes within the meaning of the trust. The other expenses must fall on the parish.

PERRYN, Baron, concurred, and added, that the defendants would be no losers, because, if they had managed properly, as it appeared they had, *they were entitled to reimbursement by a parish rate. [*122]

THOMSON, Baron, of the same opinion.

The COURT, however, chose to reconsider their opinion, and the decree was this day pronounced by

EYRE, Chief Baron:

We before delivered our opinions upon this case, and I have not now much to add.

On such a trust, where we are not bound down by any express declaration of uses, but have to collect the intent from the practice, and the terms of the surrenders, it is reasonable that if the chapel be so decayed as to be irreparable the fund may be applied to rebuild; and the alteration of the site, for conveniency to the parish, can make no difference.

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There may be a question, whether the fitting up of the new chapel be properly payable out of the funds of this charity, that not being so immediately analogous to reparations, as the rebuilding is; and if the case were for directions, whether a sum now in the hands of the trustees should be applied to that purpose, we should entertain great doubts upon the subject; but we will not pronounce a decree with such a retrospective effect, as to force the trustees to pay again, out of their own pockets, what they have laid out *bonâ fide*, for the benefit and by the desire of the parish.

[123] As the accumulations and growing rents have been swallowed up in the rebuilding, which we think properly chargeable on that fund, it is unnecessary to go into the account, what part of the expense shall be a charge on the charity, and what on the parish.

We dismiss the bill, as to the prayer, that the defendants should replace the money in the funds; declare that the future rents are not liable to make good any debt contracted for rebuilding; and enjoin the defendants from raising money by mortgage, or other anticipation of the profits, for discharge of such debts: at the same time we think the trustees are entitled, in conscience and honour, to a complete reimbursement from the parish.

In the reply, the *Solicitor-General* contended that even if it should appear that the prayer of the bill was quite wrong (as being against the acts of the defendants as trustees, whereas in fact the acts were done by them as agents for the parish,) yet the bill could not be dismissed, if there appeared a possibility of giving any directions about the charity. *Attorney-General* v. *Smart*, 1 Ves. 72; *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 552.

EYRE, Chief Baron:

It is certainly the general rule not to dismiss, where any directions are to be given, even though the prayer be mistaken.

(IN THE COMMITTEE OF PRIVILEGES OF THE HOUSE OF LORDS.)

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MARQUIS OF TWEEDDALE AND OTHERS, PETITIONERS.

(1 Anstr. 143—157.)

A writ under 6 Ann. c. 23, to certify that a Scotch Peer has taken the oaths in Chancery, does not require a teste; and if the teste is repugnant and impossible, it shall not vitiate.

ON the petition of the Marquis of Tweeddale and others, peers of Scotland, against the votes given at the late election by the Duke of Leeds (as *Lord Viscount Dumblane,) the Earls of [*144] Roseberry and Deloraine, and the Lords Sinclair, Lindores, and Fairfax, the question turned upon the validity of the several writs produced to certify that these peers had quailfied themselves to send proxies according to the directions of the statute 6 Anne, c. 23.

By that statute, section 3, it is enacted, That all the peers who meet on the royal proclamation, shall, before they proceed to the election, and in the presence of the peers assembled for such election, take the oaths, and make, repeat, and subscribe the declaration mentioned in the Act.

Section 4. "And that such peers that live in Scotland, but shall not be present at such meeting so appointed, may take the said oaths, and make and subscribe the said declaration, in any sheriff's court in Scotland; and every sheriff, or his deputy, before whom such oaths and such declaration shall be so made, subscribed, and repeated, shall, and is hereby required to return the original subscription of such oath and declaration, signed by the peer who took the same, and make a return in writing, under his hand and seal, to the peers so assembled, of such peers taking the said oaths, and making and subscribing the said oath and declaration; and such peer shall be thereby enabled and qualified to make a proxy, or to send a signed list, containing the names of sixteen peers of Scotland for whom he giveth his vote; and such of the peers of Scotland, as, at the time of issuing such proclamation, reside in England, *may take and subscribe [*145] the said oaths, and make, repeat, and subscribe the said declaration, in Her Majesty's High Court of Chancery of England, Her

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Majesty's Court of Queen's Bench, Common Pleas, or Court of Exchequer in England; which being certified by writ to the peers of Scotland at their meeting, under the seal of the Court where such oath and declaration shall be made, repeated, and subscribed, shall be sufficient to entitle such peer to make his proxy, and to send a signed list as aforesaid; and in case any of the said peers of Scotland, who, at any time before the issuing of such proclamation, have taken the said oaths, and made and subscribed the said declaration, in England or Scotland, to be certified as aforesaid, and, if taken in Parliament, to be certified under the Great Seal of Great Britain, shall at the time of issuing such proclamation, be absent in the service of her Majesty, her heirs or successors, such peer may make his proxy or send a signed list."

The instrument produced at the late election, as the writ to certify that the Lord Viscount Dumblane had taken the oaths in Chancery, (and to which those of the other peers above mentioned were similar), was in the following words:

"George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth: To our most dear cousins, the peers of Scotland, to be assembled and met at Holyrood house in Edinburgh, on Saturday the 24th day of July next ensuing, by virtue of our proclamation [*146] under our Great Seal *of Great Britain, lately issued for the election of the sixteen peers of Scotland, to sit and vote in the house of peers in the Parliament of Great Britain, to be holden at Westminster on Tuesday the 10th day of August next ensuing, Greeting. We have inspected a certain record and register in our Court of Chancery in England, made and fyled, and there remaining, by which it is manifest, that on this 14th day of June, 1790, Francis Viscount Dumblane personally appeared in open Court in the Chancery aforesaid, and then and there took and subscribed the oath of supremacy, and repeated and subscribed the declaration contained and specified in a certain Act of Parliament made in the 6th year of the reign of Anne, late queen of Great Britain, intituled, 'An Act to make further provision for electing and summoning sixteen peers of Scotland to sit in the house of peers in the Parliament of Great Britain, and for trying peers for offences committed in Scotland, and for the

further regulating of voters in election of members to serve in Parliament:' and also took and subscribed the oath of allegiance contained and specified in a certain Act of Parliament, made in the 1st year of the reign of our late royal great-grandfather George the First, late King of Great Britain, intituled, 'An Act for the farther security of His Majesty's person and government, and the succession of the crown in the heirs of the late princess Sophia, being protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abetters:' and also took and subscribed the oath of *abjuration contained and specified in [*147] a certain Act of Parliament made in the sixth year of our reign, intituled, 'An Act for altering the oath of abjuration and the assurance, and for amending so much of an Act of the 7th year of her late Majesty Queen Anne, intituled, An Act for the improvement of the union of the two kingdoms, as after the time therein limited requires, the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of treason;' according to the form, direction, and appointment of the Acts aforesaid. Witness ourself at Westminster, the 12th day of June in the 30th year of our reign."

The *Solicitor-General* and *Erskine* took two objections to this writ: 1st, it describes the time of the appearance in Chancery to be on the 14th day of June, 1790, without any reference to the year of our Lord; so that the house cannot legally understand to what the numbers 1790 refer; and then there is no date to the appearance. 2ndly, the date is impossible. The writ itself bears date on the 12th June, and certifies a fact to have happened on the 14th June, two days afterwards. * * *

Bower and *Adam* on the other side: [149]

The contradiction between the two dates must have occurred to the officer; they cannot stand together; let him reject either, and the writ is good. If the teste is rejected, it is then a certificate, without a date, that Lord Dumblane did appear and take the oaths within the time limited. If the date in the body of the writ is rejected, it is then a writ dated on the 12th June that the peer has taken the oaths according to the directions of the

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Act of Parliament; and as the proclamation issued on the 11th June, that would be a good certificate of his having appeared since the issuing of the proclamation. * * *

[150] The *Solicitor-General* in reply. * * *

The HOUSE desired the opinion of the Judges, whether the instrument in question was a valid writ within the meaning of the Act.

EYRE, Chief Baron, this day delivered the opinion of the Judges to the House:

The point proposed to us by your Lordships is, whether the instrument in question is a writ sufficient in law to certify, according to the statute of the 6th of Queen Anne, that Francis [*151] Viscount *Dumblane, on the 14th day of June in the year of our Lord, 1790, appeared in Chancery, in open Court, and took and subscribed the oaths and declaration therein mentioned. We have considered this question, and have agreed upon an opinion, which I am now to report to your Lordships, with such reasons as have suggested themselves to me in support of it.

The question describes fully the nature of the subject to which it relates; it refers to the 6th of Queen Anne, which contains a provision for electing sixteen peers to represent the peerage of Scotland in the Parliament of Great Britain; the 4th section of which statute prescribes the mode in which peers who are absent are to take the oaths which it requires.

Two objections have been stated against the instrument which certifies the compliance with this regulation in the present instance.

First, that in the body of the instrument the time when the oath is said to have been taken is not expressed with sufficient certainty, the words "one thousand seven hundred and ninety" not having any reference to the year of our Lord.

Second, that the instrument certifies the substance of the record of an act done on the 14th of June, while the instrument

itself bears date on the 12th of June, two days before; that it certifies a fact to have happened subsequent to its date, which is a physical impossibility, and therefore that the instrument is a mere nullity.

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The purpose of the objections is to make the misprision of an officer of a Court of Justice operate to destroy a valuable franchise, which this act of the Court was meant by the statute to facilitate and give effect to. The law, though it delights in certainty and precision, so far as is necessary for the purposes of justice, always tends against objections of form which are raised to defeat right and operate against its purposes; and calls for a liberal interpretation to intend every thing it can to avoid repugnancy, and where there is an apparent repugnancy, to reject the repugnant part as surplusage. The rule with respect to surplusage is universal, for though there are some old cases where it was held that surplusage could not be rejected, yet later cases have established the rule, that surplusage is always to be rejected where there is a repugnancy.

In the interpretation of instruments, the law has adopted different degrees of liberality according to the subject. Words used by ignorant men, in wills for example, receive a liberal interpretation. Juries in their verdicts, and the Legislature in Acts of Parliament, use words in their vulgar acceptation. Even in legal proceedings, the allegations of parties are to be construed according to the common import of the words. In deeds the language is more technical, but still not so as to exclude liberality of interpretation. In criminal proceedings, in the writs of Courts, whether original or judicial, there is more precision, and greater strictness is required; but still the law leans to the maxim, *ut res magis valeat quam pereat.*

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These objections are *stricti juris.*—According to the 6th Queen Anne, the appearing in Court and taking the oaths, entitles the peer to the exercise of his franchise; and this instrument purports to be a writ under the Great Seal of the Court of Chancery, by which it is intended to be certified that the act, which the statute requires as necessary to the exercise of the franchise, has been performed. But it is difficult to find out under what class of writs the present is to be placed: it has

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the form and name of a writ, but does not in its nature fall under any one class of writs. We have found no precedent for such a writ in the register. It commands nothing, delegates no power, is not returnable. Though Courts may exercise a judgment as to the rejecting of writs if null, or if they are not according to the description of the classes to which they belong, yet in regard to this writ no Court has power over it; it approaches nearest to an exemplification; yet it does not contain an exemplification of the record it is intended to certify.

The truth is, that this Act has been penned without sufficient attention to the nature of our writs: it was to be in the King's name; we have no notion of a writ that is otherwise. The first framers seem to have found a difficulty in making the King certify the fact. They have substituted his certifying an *inspeximus* of a record with the King's sense of that record, and without giving an exemplification of it, which would have given certainty to the fact of which the record is evidence.

[154] We have doubts whether this writ, in its present form, satisfies the meaning of this clause of the statute; but it is too late to state this objection now, for the writs, from the period of this statute downwards, have been in the same form with the present, and *communis error fecit jus.*

Perhaps the proper form would have been something of this nature: "Know ye, that on a certain day the Lord Viscount Dumblane appeared and took the oaths, &c." There would have been then no absurdity if the instrument had stated that the noble person had taken the oaths; but it is here said that the King has inspected a record where it appeared that the oaths were taken; this refers to the certificate of the record; and in an instrument of this nature the recital of the contents of the record may be expressed more generally than the record itself; it is only a description of the record, and requires nothing more than to be intelligible. In the record the date is probably expressed with technical propriety, in the year of Our Lord, 1790; but we hold it to be sufficient that the date is expressed in such manner as has been done in Acts of Parliament; and it

has been adjudged that a date expressed in this manner is sufficiently descriptive of the year in an Act of Parliament, particularly in the Act 9th of Queen Anne against gaming.

The second objection is, that there is such a repugnancy between the teste of the writ and the day mentioned in the body of it, on which the fact is *certified to have happened, as to make the fact certified an utter impossibility. [*155]

It seems impossible to deny that there is an apparent repugnancy; but this assumes that the writ was sealed and issued on the 12th June; if it was not issued till the 14th, there is no longer any repugnancy. In all cases the teste is not of the essence of the instrument; dates originally were not necessary; they are not necessary to deeds: even in writs, courts of law, though they require that they should have a teste, do not require that it should be of the real date; and the technical testes of writs are often false in fact.

Writs do in truth issue in the vacation, but bear teste on the last day of the preceding term; and that even where the cause of action has arisen subsequent to the day on which the writ bears teste; as happened in the case reported in Hardr. 126. In that case Sir James Bagg, the defendant's father, being an accountant and indebted to the king, died in August; after his death a writ of *diem clausit extremum* issued, bearing date the last day of the preceding Trinity Term: the repugnancy in this writ was not apparent; but the Court being informed of the day of Sir James's death, and this being stated as an objection, they held the writ to be good as being conformable to the usage of such writs, which never bear teste in vacation time, but on the last day of the preceding term. Yet the teste and the fact there had the same repugnance as in this case: the only difference is, that there the repugnance was not apparent, while here it appears *on the face of the instrument. We do not hold this [*156] difference to be essential. If the repugnancy may be reconciled by the usage of the Court, there is no longer any physical impossibility of the fact. If the teste does not conclude as to the time at which the writ was sealed, then it does not form any repugnance so as to make the instrument null.

If this writ had issued out of the Court of King's Bench,

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Common Pleas, or Exchequer, the teste would be right; as being out of Chancery it may be wrong, because it is always open, and therefore there is no necessity for giving writs issuing from Chancery a teste different from the day on which they really issue; but this is sometimes necessary, even in Chancery, as in the case of a writ of *mittimus*, which can only be certified to the King's Bench in Term time.

If a writ having such a teste and such a date in the body of it had issued in judicial proceedings, it might have been quashed, it might have abated, or errors might have been assigned upon it, yet still it would have its effect till quashed or avoided. This is not a writ in judicial proceedings, but it is examinable only by the Court from whence it issued; shall it not then have its effect till it is quashed, and shall the clerk register, the returning officer, be allowed to quash it and refuse giving effect to it?

But there is another answer. The material part of the teste is, that the writ was sealed after the oaths were taken. If the [*157] teste be repugnant to *the date in the body of the writ, why may not the teste be rejected as surplusage? If the teste is necessary, it cannot be rejected; if it is not necessary, it may be rejected. But it may be asked, why should we reject the 12th rather than the 14th? The answer is, In order to support the writ.

Original and judicial writs, no doubt, have dates, and the teste is often essential; they may be returnable within a certain number of days after it; they may be in force a certain time; they may bind property from their dates; but this is not true as to all cases, as in 1 Leonard 9, where a writ issued in the 25th and 26th Eliz. under the Privy Seal, was found to require no teste; so in this writ the date is not essential for any purpose.

We see no reason to pronounce, that an anomalous writ of this kind must have a date, or that the date must be adhered to, to the effect of avoiding the instrument; if it can exist without a date, then there is no question, for we will reject the repugnancy to support the instrument.

We answer that the instrument in question is a sufficient writ for the purpose mentioned in the question of your Lordships.

EXCH. TRINITY TERM.

1793.
June 5.

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RICHARDSON *v.* THE MAYOR, &c. OF ORFORD.

IN ERROR, FROM THE KING'S BENCH.

(1 Anstr. 231—240.)

Declaration for fishing in plaintiffs' several fishery in Orford Haven.

Plea, averring *locus in quo* to be an arm of the sea, in which all have a right to fish.

Replication averring exclusive right of fishery by prescription, traverses the general right. Rejoinder traversing the prescriptive right of the plaintiffs. Demurrer thereto.

The rejoinder is good: for the traverse in the replication was bad, and the defendant might pass it by.

THE Mayor and Corporation (plaintiffs in the action) declared for fishing in their several fishery, in a certain haven called Orford Haven, in the parish of Orford, in the county of Suffolk; and the fish, to wit, 4,000 bushels of oysters, of the plaintiffs there then being, seized, took, and carried away, and converted the same to his own use, &c. Second count, for fishing in plaintiffs' free fishery, in a certain haven called, &c. Third, in the several fishery of plaintiffs in a certain river called Orford River, otherwise the river Ore, in the parish aforesaid, &c. Fourth, in plaintiffs' free fishery in a certain river, &c. Fifth, asportavit of oysters.

Plea, first, not guilty; second, that the *locus in quo* in the four first counts the same, and the fish in all the counts the same; that *locus in quo* at the said several times when, &c. was, and from time whereof, *&c. hath been, an arm of the sea, in which [*232] every subject of this realm at the said several times when, &c. had, &c. the liberty and privilege of free fishing; whereupon defendants being subjects of this realm, &c. Third plea, that *locus in quo* is and from time whereof, &c. hath been, a common and public navigable river, in which the tides and water of the sea, during all the time aforesaid, have flowed and reflowed, and still do flow and reflow; and that in the same river in which, &c. every subject of this realm, at the several times, when, &c. had and ought to have had, and still has, and of right ought to have, the liberty and privilege of free fishing, &c. wherefore, &c.

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Replication, as to so much of the second plea as relates to the first, third, and last counts, *præcludi non*, because that Orford is, and from time whereof the memory of man is not to the contrary hath been, an ancient town, &c. and the inhabitants are, and from time whereof, &c. have been a body corporate, &c. and that the said corporation, from time whereof the memory of man is not to the contrary, have used and enjoyed, and been used and accustomed to have and enjoy, the sole and several right, liberty, and privilege of dredging and fishing for, and catching and taking, oysters, in the said place, in which, &c. without this, that in the said arm of the sea, in which, &c. every subject of this realm, at the said several times when, &c. had and ought to have the liberty and privilege of free fishery, in manner and form as the defendant in his said last mentioned plea hath above alleged; [*233] and this they are ready to verify, &c. And as to the *residue of said plea, and which relates to the trespasses mentioned in the second and fourth counts, *præcludi non*; because that the corporation of Orford from time whereof, &c. have had and enjoyed, and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the free right, liberty, and privilege of dredging and fishing for, and taking and catching oysters in the said place, in which, &c. every year, at all seasonable times of the year, at their free will and pleasure, to wit, at Orford aforesaid, without this, that in the said arm of the sea, in which, &c. (traverse as above,) similar replication, and traverses to the third plea.

Rejoinder, to the replication to such part of defendant's second plea as relates to the trespasses in the first, third, and last counts, *actio non*, because protesting that the town of Orford is not, nor from time whereof, &c. hath been a body corporate, &c. he says, that the said place in which, &c. is and at the said several times when, &c. was, and from time whereof, &c. hath been, an arm of the sea, in which every subject of this realm, at the said several times, when, &c. had and ought to have had, and still hath and ought to have, the liberty and privilege of free fishing, without this, that the said body politic and corporate, from time whereof, &c. have had and enjoyed, and have used and been accustomed to have and enjoy, and of

right ought to have had and enjoyed, the sole and several right, liberty, and privilege of dredging and fishing for, and catching and taking oysters in the said place, in which, in manner and form, &c. and this the *defendant is ready to verify; wherefore, &c. And defendant, as to the replication of plaintiffs to the residue of the second plea in bar, and which relates to the trespasses in the second and fourth counts, protesting that Orford is not an ancient corporation, and protesting that the corporation have not from time whereof, &c. enjoyed the free right of fishing for oysters, &c. takes issue on the traverse in that replication. Similar rejoinders to the replications to the last plea in bar. [*234]

Demurrer to the first rejoinder; and for causes of demurrer, &c. plaintiffs shew the following: for that the defendants have not taken issue on the traverse taken by the plaintiffs, but have attempted to put in issue another matter which is mere inducement, &c.

Judgment in King's Bench *pro quer.* allowing the demurrers.

The case was argued last Term by *Wood* for the plaintiff in error, and *Chambre* for the defendants; and again this day by *Bower* for the plaintiff, *Le Blanc*, Serjeant, for the defendant.

For the Plaintiff in Error:

A traverse may well be upon a traverse, where the first traverse is immaterial, or puts in issue a matter of law. Yelv. 200; 1 Str. 117; 2 Str. 839; Carth. 166; Hob. 104; 1 Saund. 22. It is evident, that on the plea, the general and *primâ facie* right is in the public. 4 Burr. 2162; 1 Mod. 105; 6 Mod. 73; 1 Salk. 357. The traversing that, is to traverse a mere *matter of law, arising [*235] from the fact of the *locus in quo* being an arm of the sea. The material point is, that the corporation have a particular exclusive right. That alone is decisive of the right of the parties, and therefore the only thing properly traversable. *Bedal* v. *Lull*, Cro. Jac. 221; Lord Raym. 41. By the traverse in the replication, the plaintiff might have no right, yet if he could shew an exclusive right in any other person, he would recover, which would be absurd.

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It is also bad in this, that it traverses too much. In order to try any fact upon it, the *locus in quo* being admitted to be an arm of the sea, and therefore *primâ facie* common, it would be necessary to prove a contrary right in the corporation. Their whole title is by this means in issue, consisting of the fact and legal inference of all their title deeds. But the meaning of a traverse is to reduce the cause to a single point.

It is also bad as surplusage. The plea is completely avoided by the inducement to the traverse. 4 Burr. 2162. And therefore to go further is surplusage, and to be rejected. Cro. Jac. 221.

The replication is also bad *in toto* for this, that the declaration being upon a claim of several fishery generally, the replication sets out the right of the plaintiffs to be to a several fishery of oysters only. This is not the case of a replication which merely does not support the declaration, but depart from it; that may [*236] perhaps be cured by the defendant's *rejoining, or the plaintiff have judgment on the badness of the plea; but this replication shews that the plaintiff has no title. It destroys the declaration, and he therefore cannot recover, whether the plea, or the rejoinder in support of the plea, be good or bad. Jenk. 183, pl. 71; 8 Co. 133 b; Lutw. 129. *Cutler* v. *Southern*, 1 Lev. 195, Lutw. Ent. 1402. As to these two last grounds of argument, the Court seemed clearly of opinion against the plaintiff in error.

By this replication it appears, that the plaintiffs, not being entitled to the whole fishery, but only to that for oysters, cannot maintain trespass. It should have been an action on the case.

During the argument, it was suggested by HEATH, J. that as the declaration describes the *locus in quo* to be a haven, which is synonymous with harbour, and implies an inlet or arm of the sea, it might be questioned, whether the presumption arising from that description in favour of the public right of fishery, ought not to have been rebutted by prescribing for an exclusive right in the declaration.

For the Defendants in Error it was argued:

If the traverse taken in the replication be material, the

passing it by is bad. To see whether it be material, the criterion is, whether the right can be tried upon it. In this possessory action, the defendant, by justifying, admits possession in the plaintiffs; he then justifies under a contrary title in the King's *subjects at large. An arm of the sea may be open to all the King's subjects, or may be confined. The plea states as a fact, that the *locus in quo* is of the former description, that it is an arm of the sea, in which all the subjects have a right to fish: if this averment be good in the plea, the denial of it must be good in the replication. [*237]

In trespass on land, plea *liberum tenementum* of the debt, the replication is, that it is the freehold of the plaintiff, and not the freehold of the defendant, or, *de injuria sua, absque hoc*, that it is the freehold of the defendant: the question always being, whether the land is the freehold of the defendant or not. There, as here, the right may be in a third person; but it is presumed to be in him in whom the possession is admitted. The plea here is, in substance, that the *locus in quo* is the *liberum tenementum* of the Crown, for the use of all the subjects.

The cases prove only, that there is in arms of the sea a *primâ facie* right in all to fish. In private streams, the *primâ facie* right is in the owner of the adjoining lands. If in trespass in a fishery, the defendant pleads that he is owner of the adjoining lands, and that the fishery is his, the plaintiff might well take issue on the right of fishing, without denying the right to the land adjoining, although that right gave him the *primâ facie* title to the fishery, as the being an arm of the sea does here.

The traverse is not bad for putting matter of law as well of fact in issue; that must often arise in pleading. *The Grocers Company* v. *Backhouse*, 3 Wils. *221, 234. And in every plea of [*238] *liberum tenementum*, or in the nature of *liberum tenementum*, the whole title must be in issue.

The objection, that the replication is a departure, or that it destroys the declaration, is cured by the pleading over, as the inducement is only form, and within the 27 Eliz. And if the replication were too broad, yet that cannot be taken advantage of by the defendant, whose plea is of the same matters.

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EYRE, Chief Justice :

The Court desired to hear a second argument in this case, rather from the hesitation they feel in reversing a judgment of the Court of King's Bench, than from any doubt arising from the case itself. From the first, we observed this absurdity to arise from the pleading used in this case, that the plaintiffs might recover on the traverse tendered by them, without any right, and even without possession, in themselves. If the rules of pleading allowed of such an absurdity, we must have submitted; but where the rule is not precisely and accurately fixed by precedents, the reason of the thing and general convenience must have great weight.

The replication is bad. It has been said, that this is like the case of a *primâ facie* right in a private stream in the owner of the banks; but the cases are perfectly different. That is a mere inference of fact, and therefore the fact inferred only should be stated in the pleading, and the ownership of the banks given as evidence of it. But the present is an inference of law; and [*239] therefore the fact *from which the inference is drawn, viz. that of the *locus in quo* being an arm of the sea, is the material averment. They have not traversed that, and the traversing the legal inference from it is idle.

Suppose the owner of the soil of a highway brings trespass; the defendant justifies as a public highway for all the subjects to pass and repass at their free will and pleasure; could the plaintiff, stating in the inducement a right of tolls, admit the fact of its being a public highway, and traverse the right of all the subjects to pass and repass? That is precisely like the present case; the *primâ facie* right in all the King's subjects can only be taken away by averment of a contradictory particular right; and the issue must be upon that particular claim.

If the issue could be upon the general right, it would involve the question, whether the plaintiff or any other had an exclusive right, with all the facts and legal force of the different titles set up; but by putting the issue on the particular right, the defendant is put to traverse some one part of the title set up, which answers the real end of special pleas, by reducing the question to a single point. The replication is not so broad as the plea, as has been

contended; the plea averred a material fact, of its being an arm of the sea; the replication has admitted that fact; it ought then to have rested upon the avoidance of it by the exclusive claim; but the replication waives that, and goes on to an immaterial traverse, which the defendant was therefore justified in passing by.

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The whole facts should have been tried on the general issue; but it is too late to object that now.

Judgment reversed.

GUPPY *v.* JENNINGS.

(1 Anstr. 256—257.)

1793.
June 12.
[256]

Indenture of apprenticeship for five years; the father covenanting for the due service of the apprentice: the son avoided the indenture by leaving the service; it is void against the father also.

ACTION of covenant. The son of the defendant was bound apprentice to the plaintiff by indenture for five years; the defendant covenanted that he should serve the plaintiff during that time, and that he should find him in clothes and medicine. The declaration assigned three breaches: first, that the apprentice had quitted the service of the plaintiff; second, that the defendant had not found him in clothes during the apprenticeship; third, that he had not found him in medicines.

The defendant pleaded, that the apprentice had continued in the service, and had been found by him in clothes and medicine, till a certain day, when he quitted the service of the plaintiff, the indenture being void by the statute.

The plaintiff demurred to this plea.

Walton, for the plaintiff:

The indenture, though for less than seven years, and therefore void as against the apprentice if he chooses, yet is good for every other purpose. *St. Nicholas* v. *St. Peters*, 2 Stra. 1066; Burr. S. C. 91. The father has entered into separate independent covenants for the due service of the son, and these remain, although the covenant of the principal is avoided. *Walter* v. *The Dean of Norwich*, Brownl. 21; *Northcote* v. *Underhill*, 1 Salk. 199.

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Gibbs, on the other side:

I admit that this indenture could not be avoided by a stranger; but it has been avoided by the apprentice, and all the covenants must fall with it. The statute 5 Eliz.* says, that all indentures, covenants, and bargains for the having, taking, or keeping an apprentice contrary to the Act, shall be void. Then this indenture is void; and the covenants to secure the plaintiff's keeping the apprentice are void. It is therefore not like the cases where one part of an agreement becomes void, and the other independent covenants remain good: here the whole is avoided.

MACDONALD, Chief Baron:

These covenants are completely dependent upon the principal agreement, and must fall to the ground when it is avoided.

HOTHAM, Baron:

If the indenture of apprenticeship is void, all the covenants entered into merely to secure performance of that indenture must, *a fortiori*, be void also.

THOMSON, Baron:

The indenture is for the keeping of an apprentice; then it is clearly void by the statute, and no part of it can be good.

1793. *June* 14.

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DOE, ON DEM. DUPLEX AND OTHERS, *v.* PENRY AND OTHERS.

(1 Anstr. 266—268.)

If at the trial of a cause, the counsel on both sides argue upon the effect of an instrument, as being in evidence, and it is by mistake never in fact produced, after verdict for the plaintiff, the defendant cannot take advantage of the omission.

Payment of rent by the trustees of a chapel is *primâ facie* evidence of possession by them.

THIS ejectment was tried before the Lord Chief Baron at the sittings in last Term. The only witness produced on the part of

* c. 4, s. 41. See also s. 26.

the plaintiffs, was the officer of the City of London, who proved that he had for several years received for the city, rent for the premises in question, which was always paid in the name of the twenty-five trustees of Mr. Wesley's chapel; but he did not specify who these trustees were, nor was any occupation by the plaintiffs as such trustees proved. The facts of the cause having been before the Court on a former occasion (*vid. ante*, p. 554), the counsel for the defendant produced no evidence, but addressed the jury upon the effect of the trust-deed, the want of title in the eight new trustees, and rested the defence of his clients on the right of the five dissentient trustees under the trust-deed. The Chief Baron having summed up the case to the jury, the counsel for the defendant then first objected, that the evidence was insufficient, but insisted so little upon it, that it was hardly attended to by the judge. A verdict was given for the plaintiff; and *Plumer* having obtained a rule to shew cause why a new trial should not be granted, cause was this day shewn by

Piggot, *Law*, and *Gibbs*, who contended, that this evidence was sufficient against the defendants, until they shew some title on the other side; and whatever might have been the case if this objection *had been taken in proper time, when the plaintiff [*267] might, if thought necessary by the judge, have produced further evidence, it is waived by the counsel for the defendant addressing the jury on the fact of this deed, and of possession under it, as an agreed fact. The merits being known to the Court by the affidavits in the former application, and the cause since gone into Chancery, upon an information at the suit of the Attorney-General, on the relation of the five dissentient trustees against the others to settle the trust, the Court will not give way to a formal objection against the real justice of the case on an application to their discretionary jurisdiction. *Edmondson* v. *Machel*, 2 Term Rep. 4; so Salk. 646; and in *Harvy* v. *Grant*, Trin. 23 Geo. III. and *Golightly* v. *Thelusson*, this term in the King's Bench, where the Court were satisfied that the plaintiff had merits, formal objections were not allowed to set aside the verdict in his favour.

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DUPLEX v. PENRY.

Plumer and *Marryatt*, for the defendants:

Here the officer only proves that somebody paid rent. It is not even proved that the plaintiffs were the persons who paid rent; and payment of rent alone is no proof of possession: for then any one who pays rent to the landlord, or to any other person, would thereby obtain a *primâ facie* title to land which he never possessed. Payment of rent is only evidence to shew the occupation (already otherwise proved) to be in the character of tenant, but cannot be evidence of occupation; and here, by the nature of the action, possession is admitted in the defendant. The cases cited are all where the evidence has been sufficient to [*268] establish the merits, *but the declaration has not accorded accurately with the case proved: here there is no evidence. If this verdict stands, it will lie open, after every verdict to contest the propriety of it, or support its authority on affidavits of new facts. The merits here are not known.

MACDONALD, Chief Baron:

I am not yet convinced that the evidence was insufficient. It is in the nature of this trust, that the trustees should not occupy the chapel, but that all the followers of the sect should equally occupy it: then the only means of the trustees to prove their possession, is by a regular payment of rent to the city, who are the owners of the soil: and this is like the case 2 Show. 126. But at all events, the manner of conducting the cause amounts to an admission of the other facts; and we should not be answering the ends of justice if we were to grant a new trial on this objection.

HOTHAM, Baron:

Whatever might have been my judgment, if the objection had been pressed before me at *Nisi Prius*, I am of opinion, that the defendant has lost the opportunity of questioning it. He has lain by till the plaintiff was too late to adduce fresh evidence; and after finding the Court against him on the main ground, would take advantage of this objection. As we cannot help seeing the merits are with the plaintiff, the verdict ought to stand.

PERRYN, Baron, and THOMSON, Baron, concurring in the reasons given by Mr. Baron HOTHAM,

The rule was discharged.

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HEATH *v.* YEOMANS.

(1 Anstr. 271—272.)

1793. *June* 15.

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To set aside proceedings for want of authority, the evidence of the person in whose name the proceedings are taken should be tendered or its omission accounted for.

DAUNCEY moved to set aside the judgment, on affidavits that the plaintiff had, from the beginning of the suit, told the defendant that the attorney had not his orders or consent to begin it or carry it on, and that he, the plaintiff, would not consent to its being pursued further: notwithstanding which, the attorney for the plaintiff *gave notice of trial and had a verdict, nobody appearing for the defendant. These affidavits were made by the defendant and other persons, and not answered.

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By the COURT:

The affidavit of the plaintiff himself would have been the best evidence of this fact, and as that has not been produced, nor the omission accounted for,

The rule must be discharged with costs.

EXCH. HILARY TERM.

ATKYNS, CLK. *v.* HATTON, BART. AND OTHERS.

(2 Anstr. 386—397.)

1794. *Feb.* 10.

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A terrier cannot be received in evidence, unless it comes from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found.

THE plaintiff, rector of St. Michael's parish in Longstanton, brought this bill principally for an account of tithes. * *

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*As to a farm of 900 acres of sheep-walk, called Burgoyne's flock, the defendants set up a modus of forty shillings in lieu of the tithes of wool and lamb.

To disprove this modus, the plaintiff offered in evidence a paper purporting to be a terrier of this parish, found in the charter-chest of Trinity College in Cambridge, who were landholders in the parish.

Burton, for the defendants, objected to this evidence, as not coming from a quarter that could give it authenticity. The proper place is the bishop's registry office.

Richards:

The original is always lodged there, but as the register has been inspected and the original cannot be found, the copy becomes evidence. The college is interested to preserve it; and it is not therefore to be considered as in the hands of a stranger, but in a proper repository.

Burton:

The proper repository for the copy is the parish chest.

The evidence was rejected.†

† MILLER *v.* FOSTER and another, at Warwick, Summer Assizes 1794, *coram* Macdonald, Chief Baron.

This was an issue directed, by a late inclosing Act, to try whether the plaintiff's land was exempt from tithes when in the manurance of the proprietor; the defendants, Mr. Foster and —— one of the prebendaries of Litchfield, in right of his prebend, were seised by moieties of the rectory. The plaintiff's *counsel offered in evidence a paper, purporting to be a terrier of the parish, found in the registry of the dean and chapter, and argued, that as that was the proper repository for the muniments of the prebend, it was admissible. His Lordship mentioned the case of *Atkyns* v. *Hatton*, as deciding that the proper repository was the bishop's registry office; and that, if found elsewhere, it could not be admitted in evidence.

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Percival then contended, that as it could not be considered as a terrier, from not being found in the proper repository, it was merely to be treated as an old paper found among the muniments of the prebendary, kept by the chapter as a memorial of their rights, and therefore evidence against them.

MACDONALD, Chief Baron:

A terrier is an instrument well known in the law. By the canons it is directed that an inquiry shall be from time to time made of the temporal rights of the clergyman in

ATKYNS *v.* LORD WILLOUGHBY DE BROOKE AND OTHERS.

1794. *Feb.* 10.

[397]

(2 Anstr. 397—403.)

The Court will not decree against a farm modus (set up by way of defence) on the ground of rankness.

Whether notice is necessary to determine a composition where a modus is insisted upon, *Quære.*

THIS was a bill filed by the same plaintiff against others of his parishioners. * * *

The defendants, Lord Willoughby and his tenant Goodcheap, set up an immemorial payment, due and payable by the owners or occupiers of those lands, by way of modus or composition for the small tithes of their land; it consisted of 340 acres, and was stated to be an ancient farm settled by a parliamentary entail on the family of Lord Willoughby in the 37 H. VIII. No evidence was produced of any *actual agreement for a composition having been ever made. The existence of the payment, as far back as could be traced, was clearly proved. Sir Thomas Hatton, lessee of the rectory, under the plaintiff, had received this composition. The plaintiff himself never did, nor did Goodcheap, the occupier of the farm, ever pay it, having come into possession but a few months before the bill was filed. He insisted on the payment, as being at least good as an annual composition, to determine which no notice had been given.

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Graham and *Richards*, for the plaintiff, contended, that this modus was not set forth with sufficient certainty: it was pleaded as a modus or composition; whereas the claim of exemption

every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information. That return is called a terrier, and has authenticity from being found in the proper place. Then this paper, purporting to be an instrument taken notice of in the law, must stand or fall according as it has the requisites of such instruments to render it authentic. This has not; and therefore cannot be received in any other light: it is a terrier, or nothing.

A new trial has since been granted by the Court of King's Bench, upon the ground that this evidence ought to have been received.

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set up, being against common right, must be accurately defined.

The payment is said to be due from the owners or occupiers. This leaves the clergyman uncertain to whom he shall resort for the recompense he is to receive for his tithes; each may shift it off upon the other. As a modus, this payment is rank. By the survey in Domesday, it appears that the two parishes, which consist of about 2,000 acres, were then valued at 8*l.* This defence set up, supposes, that within 116 years afterwards, at the time of memory, the small tithes of 340 of those acres were valued at 4*l.* Of these, the greatest portion, 211 acres, are arable land in the common field, where hardly any small tithes could arise; the other 129 acres are stated to be meadow and pasture land. And it must be maintained that, after deducting all hay-tithe, the other tithes arising from those 129 [*399] *acres, were compounded for before the time of memory at 4*l.* That would be nearly a fair composition now; but on a moderate calculation, the value of money was then eight times as much as it is now; so that it is equal to a composition for 32*l.* at present.

If the payment be clearly greater than can be supposed to have been a fair composition before the time of memory, the Court will over-rule the claim, without sending it to a trial at law. *Chapman* v. *Smith*, 2 Ves. 514; *Bishop* v. *Chichester*, 2 Bro. R. 163; *Ekin* v. *Pigot*, 3 Atk. 298.

The claim of the tenant to have this considered as an annual composition, totally fails; for it appears that Goodcheap never paid this composition; so that it is not a personal contract with him. And it cannot be considered as running with the land, for his landlord, Lord Willoughby, does not set up such a claim.

The plaintiff never accepted this composition, and therefore any agreement of his predecessors, or of his own lessee, can have no effect to bind him, or to make notice necessary. They are wholly void.

Besides, the tenant as well as his landlord has set up an adverse title, a modus, and have therefore, agreed to consider themselves as not holding by annual agreement under the rector. [*400] Notice is held necessary, by analogy to the case of landlord *and

tenant from year to year; and their setting up an adverse title is held a waiver of notice to quit possession.

Burton and *Steele*, for the defendants:

The cases where the Court have decided a modus to be rank without sending it to a jury, have all been where a modus has been set up for a specific thing, as a sheep, the price of which is easily ascertainable; for it cannot be supposed, that any man would agree to pay more than the value for every sheep or cow that he or his posterity should ever have on the land. But a farm modus is not so easily computed or ascertained; the difference of cultivation may throw more or less of the produce into the small tithes at different times; a landlord, wishing to improve, may have given more than the exact value; or a pious owner may have chosen to settle a considerable annuity out of his land upon the church. In *Chapman* v. *Smith*, this distinction is taken, by Lord HARDWICKE. So in *Edge* v. *Oglander*, Hil. Term, 1691, cited in Bunb. 301, a modus of 8*l.* for a farm of the value of 80*l.* a-year was allowed.

The defendant Goodcheap is entitled to the benefit of this composition, being a running contract with the rectors, continued after the plaintiff became rector, and paid to his lessee. That notice was necessary to determine it, notwithstanding the modus set up, is decided in the *Kensington* case, *Adams* v. *Hewitt*, 1782, and *Bishop* v. *Chichester*, 2 Bro. 161.

Graham, in reply: [401]

The *Kensington* case was, where an actual agreement had been entered into between the clergyman and the parishioners, and they insisted on it as a composition during the incumbency. The Court held otherwise, that it was only good from year to year, but that notice was necessary to dissolve it; for that was not a denial of the clergyman's right; it was not an adverse claim, but a claim under him for a longer term

MACDONALD, Chief Baron:

I believe the question of notice in that case originated with

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Lord MANSFIELD in the House of Lords; it had not been taken notice of in this Court, nor in argument there.

Graham:

In the case of *Bishop* v. *Chichester*, the rector, by giving an irregular notice, admitted the necessity of a notice; and probably there had been some agreement between them, or an acceptance of the payment, which supposed an agreement; it is expressly founded on the *Kensington* case. Lord THURLOW declaring that he decided contrary to what he should have conceived to be the law, as being unable to distinguish it from that case, and bound by it. Then if, in fact, the case of *Bishop* v. *Chichester* was not distinguishable from the *Kensington* case, it has not carried the rule beyond it, and is to be considered merely as a confirmation of it; if it was distinguishable, then the reason of the decision fails, and it is to be considered as a misapplication of the old rule, not as the adoption of a new. The [*402] present clearly is *distinguishable from the *Kensington* case; for here the defence set up is a modus, a title paramount and inconsistent with any agreement or composition with the plaintiff; both parties contending that no agreement exists; then a notice to determine it must be superfluous.

As to rankness; if the arguments relied on are admitted, no modus can ever be set aside on this ground; for it is impossible to define how far the benevolence of the former proprietors may have led them in granting beneficial contracts to the clergy. The cases relied upon do not establish any thing like the distinction contended for between farm moduses and others. The case of *Chapman* v. *Smith* went on the peculiar situation of Romney Marsh, where the prospect of great improvement by draining might lead the proprietor to agree for more than the existing value. In *Edge* v. *Oglander*, the modus was so large that the vicar probably agreed to take it as the full value of the tithes, and the decree must then have been by consent, as in *Bates's* case, cited 2 Ves. 513.

MACDONALD, Chief Baron:

To the modus set up in this case several objections have been

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taken: First, it has been argued, that it is not laid with sufficient certainty to found a decree; and if this were a bill to establish these moduses, that might be the case; but in an answer, such strictness is not requisite; if it appears that there is a good defence, that is sufficient. The second objection is the rankness of the modus, and the Court is desired, on that ground, to over-rule the defence. *But it has properly been stated, that a very material difference subsists between a farm-payment and one for a particular species of produce. In the former many reasons may have prevented the tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wished to pay for an exemption from tithes for the sake of improvements. Besides, it is hardly possible to ascertain the comparative value of the land, or of the produce, in former times; and the Court should not be nice in judging of the value or the goodness of the bargain, where, by any probable circumstances, the modus may have been a real agreement between the parties before time of memory. More especially ought the Court to be extremely cautious in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness. *Edge* v. *Oglander*, *Chapman* v. *Smith*, *Pole* v. *Gardiner*, 1 Bro. P. C. 214.† Under these circumstances, the Court will not decree for the plaintiff, against the modus set up; but if the rector desire an issue, undoubtedly he must have it.

[*403]

1794. *Feb.* 11.

[407]

——— *v.* ———

(2 Anstr. 407.)

GRIMWOOD moved that proceedings should be stayed till the plaintiff, who, since filing the bill, was become bankrupt, should give security for costs.

This was refused, as not being supported by the practice of the Court in any instance.

† See S. C. 9 Vin. 18, pl. 47, 2 Eq. Ca. Abr. 734, pl. 1.

1794.
March 1.

[413]

BREWER *v.* HILL.

(2 Anstr. 413—420.)

Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre; and thereto bound himself and his assigns. His under-lessee sued (in the name of a trustee to whom he had nominally again under-leased) for tithes in kind against the tenant of the land, and had a decree. Such an agreement is void for the uncertainty of the sum to be paid.

The lessee of the land cannot claim to hold discharged of tithes under any covenant with his lessor.

An under-lessee is not an assign within the meaning of the covenant: nor can the tithes be bound by such a covenant of the lessee.

A lease of tithes, or other matter which lies in grant, for all the time the lessor should continue vicar, is good, and conveys a freehold.

THIS was a bill for an account of tithes on the lands in the defendant's possession, in the parish of Hemel Hempstead, Herts. The plaintiff claimed to be lessee of these tithes, under a demise from Sir James Peachey, in the year 1781, to Thomas Trott for twenty-one years; Trott in 1789 underleased to Thomas Patrick for twelve years; in 1790 Patrick demised the same to the plaintiff for five years. The defendant claimed to be discharged from payment of tithes in kind, and set forth an agreement made in 1783 between his lessor of the lands in question, Christopher Tower, and T. Trott, the then lessee *of the tithes, by which Trott in consideration of Tower's having demised to him certain other lands, did "for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said Christopher Tower, his heirs and assigns, that he the said Thomas Trott, his executors, administrators, or assigns, shall not nor will at any time or times during the said term of twelve years, take the tithes in kind from any present or future tenant or tenants of him the said Christopher Tower, in the said parish of Hemel Hempstead, but shall and will accept and take of and from all and every the present and future tenant and tenants a reasonable composition for the same, not exceeding 3*s.* 6*d.* an acre for the said tithes:" then followed a proviso, that upon non-payment of the composition at each half-year, or within thirty days after, the tithes should be taken in

[*414]

kind. The defendant also proved, that the plaintiff's lease from Patrick was only colourable, and that he was to be considered as agent or trustee for Patrick. The defendant became tenant to Tower of the lands in question in 1790, and claimed to be discharged of payment of great tithes in kind on paying the composition at the rate of 3*s*. 6*d*. per acre. The title of Sir James Peachey (through whom the plaintiff claimed) to the small tithes, was a demise from the vicar "for all the time the said Dr. Bingham should continue vicar."

Plumer and *Grimwood*, for the plaintiff, contended that the plaintiff was not bound by the agreement with Trott. The covenant is not, that no tithes shall be demanded, but only that Trott, his executors, administrators, or assigns, should not *take [*415] such tithes. The plaintiff is not within this description, he is not an assign. The distinction between an assignee and an under-lessee is very strongly marked. *Crusoe* on dem. *Blencoe* v. *Bugby*, 3 Wils. 234; *Kinnersley* v. *Orpe*, Doug. 56; *Holford* v. *Hatch*, Doug. 174.

This covenant does not run with the tithes, it is merely personal, 5 Rep. 16, a. Those covenants only run with the land which are made by the original lessor, not those which his lessee makes. And besides, it is from its nature collateral to the tithes; it is not a demise of part, or an agreement to retain, but merely a covenant to come to a reasonable agreement each year, not exceeding 3*s*. 6*d*. per acre. Then there can be no privity between the present parties, and the covenant has no force between them.

Even between the original parties it could not operate as a lease of this portion of tithes, for there is no certain rent reserved so as to make it a lease. The same uncertainty makes it void as a covenant, for there must be mutual remedies in a valid covenant; but here the composition being unfixed, Trott could demand nothing in certain.

At most it was only a personal covenant between them, which might have been enforced in equity. But as the plaintiff is a *bonâ fide* purchaser for valuable consideration without notice, the equity does not run against him.

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Burton and *Allcock*, on the other side:

It appears from the statement of the plaintiff's case, that *he has not brought the proper parties before the Court. Brewer holds in trust, as to the greater part of the whole of the tithes, for his nominal lessor, Patrick. The *cestui que trust* must be a party. In a similar case, *Stafford* v. *The City of London*, 1 P. Wms. 428, the bill was dismissed for want of joining a material party. It appears also, that if the plaintiff succeeds in his demand, the defendant will have his remedy against Tower, and he against Trott. These, therefore, are material parties to the suit, and ought to have been joined in the bill.

The agreement with Tower, in fact, operates as a demise. A covenant with a stranger, that he shall have the tithes, is a lease as much as if it had been of lands; and so if made with the tertenant, it is a right of retainer in the nature and with all the qualities of a demise, and if made by deed is good. *Hawkes* v. *Brayfield*, Cro. Jac. 137. And to constitute such an instrument, no form of words is essential. 3 Bac. Abr. 419.

The rent is certain if considered at 3*s*. 6*d*. per acre, as the tenant has done. If this is considered as a demise or retainer of the tithes, it is a grant of part of the thing itself, and no posterior grant can be good against it; but if only considered as a covenant, yet it shall bind the covenanter, and all claiming under him. The cases cited, all relate to collateral covenants; as where the lessee of Whiteacre covenants to build a house upon Blackacre, that covenant runs not with the land, and his assignee shall not be bound by it. But the present covenant immediately relates to the tithes themselves, and cannot be collateral.

[417]

The plaintiff is within the covenant, for he is an assign of part of the interest of Trott in the premises; even if not named, he would be bound by reason of the privity of estate. *Bally* v. *Wells*, 3 Wils. 25.

As to the small tithes, the lease is bad: it is for so long a time as the lessor should continue vicar; and therefore void for the uncertainty. Shep. Touchst. 274-5; Co. Lit. 45 b; Plowd. 273 b. If it were good at all, it would convey a freehold; but for that purpose a livery of seisin would have been necessary.

MACDONALD, Chief Baron, this day delivered the opinion of the Court, and after stating the case, proceeded to the following effect:

The defendant insists on the agreement between Trott and Towers, as discharging the land in his occupation from payment of tithes in kind, on rendering the composition of 3*s.* 6*d.* per acre; and as to the small tithes, he also objects to the title of the plaintiff, that the lease from Dr. Bingham is void for the uncertainty of its duration. [417]

The plaintiff insists that he has the legal title in him, and that having purchased without notice of any agreement with the landholders, they can set up no equity against him.

To this the defendants have given two answers: first, that the agreement entered into between Trott and Towers, amounts to a lease of this portion of tithes from the former; and secondly, that if not a *lease, it is a covenant running with the tithes, and good against the plaintiff. [*418]

It is true, no specific words are necessary to create a lease; but there must be words shewing the intent to demise. Here there is no certain rent reserved. Trott agrees to accept a reasonable composition, not exceeding 3*s.* 6*d.* per acre. Suppose he had claimed this sum of 3*s.* 6*d.* per acre from the tenant, would the tenant have been obliged to pay it? He, clearly, might have either preferred to pay tithes of kind, or have tendered the reasonable value of the tithes, under that sum. Then the sum reserved is not certain, and cannot be called a rent.

This is also an agreement, not that Towers himself shall pay the rent and take the tithes, but only in favour of his tenants in the premises. Towers is to enjoy nothing, nor to pay any rent. It cannot be a demise to him. The tenant is not a party or privy to the transaction; it cannot therefore be a demise to him. It can, at the utmost, amount to no more than a mere covenant with A. that B. shall enjoy, and creates no lease to either. This is decided in *Littleton* v. *Perne*, 1 Leon. 136; and in *Porry* v. *Allen*, Cro. Eliz. 173, it is expressly so ruled by ANDERSON, Chief Justice.

Even if this had been a direct covenant with the tertenant, it could only have amounted to a covenant, that he should retain

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the tithes and pay a composition, or render tithes in kind; for the proviso gives him that option. By such a disjunctive covenant no interest passes.

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From the whole of this clause taken together, with the proviso that accompanies it, I am clearly of opinion, that this can only be considered as a covenant, and not a demise.

But it has been argued that it is such a covenant as runs with the tithes, and binds them in the hands of the plaintiff. This is the case of a covenant not contained in the original lease of Sir James Peachey, but entered into by his under-lessee. The case of *Holford* v. *Hatch*, Doug. 184, establishes the rule, that an under-lease is a new substantive contract, independent of the other between the original lessor and lessee, whereas an assignee is one put in the place of the original lessee, and who becomes lessee to the original lessor. Then this covenant of the lessee could not bind the land in the hands of his under-lessee, as an assign, according to the words of the covenant; and as no notice has been proved, the plaintiff is not affected with any equity from this personal covenant of his lessor.

As to the vicarial tithes, the rule laid down in Shep. Touchst. 274-5; Co. Lit. 74 b; as to the certainty of the term, is this, that such a lease for years, of land, is void. To this passage in Co. Lit. Mr. Hargrave has subjoined a note, in which he is well warranted, that in such cases, if a livery of seisin is made, the lease is good as a lease for life determinable on the particular event. But of rents or other things which lie in grant, the mere delivery of the deed has the same force as livery has in the case of land; and therefore any demise of uncertain duration, gives an estate for life determinable *on the particular event. Then, if in the principal case there had been a vicarage house or glebe demised, and the tithes had only passed as parcel of the vicarage, the whole would have been bad for want of livery: but here the whole matter demised lies in grant, and the demise is therefore good, as an estate for life during the time that Dr. Bingham shall continue vicar.

[*420]

There must be an account for both great and small tithes; but I cannot avoid observing that the defendant fails, not from any want of equity or conscience in his case, but from the necessary

application of a rule of law against him; and probably he will be entitled to his remedy over against Trott, through whose bad faith he has been led into this mistake.

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BIRCH *v.* ELLAMES AND GORST, SURVIVING ASSIGNEE OF TOWSEY, A BANKRUPT.

(2 Anstr. 427—432.)

1794. *March* 1.

[427]

The title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The Court decreed for the plaintiff.

JOHN TOWSEY, the bankrupt, in the year 1776 contracted for the purchase of certain premises in Chester, and being obliged to borrow the purchase money, 350*l.* from the plaintiff's testator, Dr. Peploe, placed the title-deeds in his hands as security for repayment, giving at the same time a bond with two sureties, for the sum. Being, in the year 1790, very much embarrassed in his circumstances, and indebted to the defendant Ellames in a considerable sum of money, he executed a mortgage of the same premises to him. The plaintiff could not prove any actual information of his claim having been given to the defendant prior to the execution of this mortgage. The defendant in his answer did not pretend to have made any inquiries after the title-deeds before he took the security, and admitted, that upon executing the mortgage he inquired for them, and was informed of their being in the hands of Dr. Peploe; but that he understood them to be so for safe custody only: he received this information from Jonathan Tushingham, who was his brother-in-law, and who had prepared the mortgage, and appeared as his agent at the time of the execution of it. The mortgage bore date the 4th of January, 1790; in fact it was not executed till the 5th of February; and on the evening of the same day Towsey committed an act of bankruptcy.

Burton, *Plumer*, and *Richards*, for the plaintiff, insisted that [428]

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the deposit of title-deeds with Dr. Peploe amounted to an equitable mortgage, and should prevail, unless against a subsequent purchaser without notice, *Russel* v. *Russel*, 1 Bro. 270, *Featherstone* v. *Fenwick*, 1784, *Hurford* v. *Carpenter*, 1785, ibid.(*n.*) A prior mortgagee without title-deeds, is postponed to a subsequent purchaser who has them. So here, the not enquiring for the title-deeds, is of itself a strong badge of fraud, and distinguishes the present from those cases where a purchaser has been imposed upon, and his diligence defeated by misrepresentation. In some of those cases the non-production of the title-deeds has been held not conclusive evidence of notice, because sufficiently accounted for; here it stands unexplained. The defendant admits notice upon executing the mortgage, which might be immediately before as well as immediately after it. The notice was at the same meeting, and part of the same transaction. Notice of a deposit is sufficient to put the defendant upon making further inquiries into the nature of the transaction which occasioned it. Thus, if A. mortgages two estates to B. by separate conveyances, and afterwards sells one of them to C. without informing him of the mortgage of the other estate, yet as A. could not redeem the one estate without redeeming the other, so neither shall C.; for notice of the one mortgage to B. is constructive notice of the whole equity, which by proper enquiries, he ought to have made himself acquainted with. *Ex parte Carter*, Ambl. 733.

[429] The information of the title-deeds being in Dr. Peploe's hands, was given at the time of the mortgage, by his agent, who must therefore have known it before. This amounts to notice to the principal.

The circumstances of the mortgage to the defendant being antedated, and purporting to be for value then paid, whereas in fact, it appears to have been for securing an old debt, shew this transaction to have been fraudulent both as against the plaintiff and the other creditors, in order to give the defendant an undue priority.

Partridge and *Pemberton*, for the defendant Ellames:

The claim of the plaintiff is founded on a presumption that he has an equitable mortgage: but a deposit has been held to amount to an equitable mortgage only where accompanied with

an agreement to perfect the conveyance afterwards, and then it amounts to a part performance of the agreement; here no such agreement has been proved, and on the contrary it appears that the personal security of Towsey and his sureties in the bond was principally depended upon, and the deeds only left in Dr. Peploe's hands as a collateral security.

But supposing his equity established, still the legal right of the defendant Ellames, being obtained without fraud, must prevail.

The cases where a second mortgagee, having the title-deeds, has been preferred to the prior mortgagee, *who had not, went [*430] upon the ground of fraud, in giving the mortgagor an opportunity of imposing on such subsequent purchaser; that reason will not apply to this case, where the equitable claim was prior, in point of time, to the legal estate of the defendant; and it is now settled, that where no fraud is proved, the rule does not hold. *Tourle* v. *Rand*, 2 Bro. 650. It does not appear that Tushingham knew for what purpose the deeds were left with Dr. Peploe, and therefore his knowing the fact of the deposit amounts to nothing; it is not notice to him, nor to his principal, of the nature of the transaction between Towsey and Dr. Peploe.

The same sort of constructive notice was attempted to be established in the case of *Plumb* v. *Fluitt*,† in this Court, 1791, but without success. That case cannot be distinguished from the present. The defendants in both have taken the best security they could get from debtors whose circumstances they distrusted. This ought to be considered as that was, a plank seized in a wreck; and although no great diligence has been exerted in either case to sift the state of the security, yet that may well be omitted without any fraudulent intention by a man who knows he must take this or nothing, as was observed by the Court in that case. Here the laches of the plaintiff is much greater than in *Plumb* v. *Fluitt;* for Dr. Peploe not only omitted to get a mortgage executed to him when he might have done it, if such was the agreement, but has lain by since the year 1776 without calling for a completion of the contract. Equity always leans *against the stale demands. *Earl of Deloraine* v. *Browne*, 3 Bro. [*431] 633; *Smith* v. *Clay*, ibid. (*n.*)

† See p. 605, *post*.

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April 1.

MACDONALD, Chief Baron, this day delivered the opinion of the Court, and after stating the case, spoke as follows:

The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court, against the mortgagor, or any who claim under him with notice, either actual or constructive, of such deposit having been made. From all the circumstances, we are of opinion that the present is a case of that description.

It is evident that both Towsey and Ellames knew themselves to be engaged in a fraudulent transaction, of which they dared not disclose the truth. In order to make the pretended ignorance of the plaintiff's equity appear more plausible, the mortgage is recited to be for money then advanced upon the security of the premises; it turns out that no money was advanced. It is ante-dated a month, to prevent the appearance of having been done on the eve of the bankruptcy.

The defendant swears, that upon executing the mortgage, he had notice of the title-deeds being in the plaintiff's hands, and seems, under the ambiguity of the expression, to shelter himself from being fixed with notice prior to his taking the security. Upon this information he cautiously avoids asking the reason of the deposit. Upon all the circumstances, we are clearly of [432] opinion that he *avoided acting in the usual way on purpose to have a pretence of want of express notice. If this defence can be sustained, no equitable title can ever be made good against a subsequent purchaser.

We shall, for these reasons, decree the defendant Ellames to pay the demand of the plaintiff, or stand foreclosed, and convey, &c.

PLUMB *v.* FLUITT.

(2 Anstr. 432—441.—Reported by Mr. Anstruther, from a note furnished to him.)

1791. *Jan.* 27.

[432]

Title deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance: this was held good.†

It was a bill brought for a sale, in order to obtain payment of two mortgages made by one Basnett of the lands in question, and to restrain the defendant from proceeding at law to recover possession of the premises.

It appeared that about the beginning of the year 1779, Basnett being indebted to Pattison Ellames, and then obtaining a further loan from him, amounting together to the sum of 316*l.* delivered to him the title-deeds of one of the premises in question, called Massey's Lodge, as a security, and signed a memorandum stating himself to have done so, and binding himself to mortgage the same to Ellames, for his further security, when requested. Being *about the same time indebted to the plaintiff Plumb in the [*433] sum of 12,000*l.* he deposited with him the title deeds of the other premises in question called Massey's Office, or The Warren, as a security for that sum. The bill also charged an undertaking to complete this security by a mortgage, when required: but no memorandum to that effect was entered into.

About the month of June, 1779, Basnett appearing to be in declining circumstances, and then indebted to the defendant Fluitt in 530*l.* was pressed by him for payment or security of that sum; and accordingly, on the 2nd of July in that year, executed to him a mortgage to that amount of both the estates above-mentioned.

The circumstances of this transaction were disputed. The plaintiff endeavoured to fix the defendant with actual notice of the deposits, and for that purpose read the testimony of Basnett, who swore that he had informed the defendant of the deposits of the title-deeds before the execution of the mortgage.

Partridge, on behalf of the defendant, objected to this evi-

† See *Taylor* v. *Russell*, C. A. (1890) '91, 1 Ch. 8, 60 L. J. Ch. 1.

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dence, as tending to invalidate his own instrument, and relied on *Walton* v. *Shelley*, 1 Term Rep. 296.

EYRE, Chief Baron:

Here the witness is not to invalidate or destroy the instrument he himself made, as in the case of *Walton* v. *Shelley*, but merely [*434] to explain a collateral circumstance which *eventually affects the operation of the instrument in arranging the rights of the other parties.

The evidence was admitted.

On the other hand it was sworn in the answer, and confirmed by the son of the defendant in his evidence, that on the mortgage being proposed, the defendant, on the 25th of June, sent his son to Basnett to get the title-deeds; Basnett said he could not give him them, but promised to bring them in a few days: on the 2nd of July, when the mortgage was to be executed, he again excused himself for not bringing the title-deeds with him, but promised to send them next day. On the 4th of July, after the execution of the mortgage to the defendant, he first informed the defendant's son of the title-deeds being deposited as a security for debts.

About the beginning of the year 1780, the defendant went to Ellames to inspect the title-deeds, but it did not sufficiently appear, that Ellames and the plaintiff knew of the defendant's mortgage.

On the 2nd and 12th of February, 1780, Ellames and the plaintiff got from Basnett mortgages of the premises of which they had the title-deeds respectively.

On the 23rd of February, the defendant gave notice to Ellames and Plumb not to advance money on the security of the premises.

On the 8th of October, 1780, the plaintiff Plumb took an assignment of Ellames's mortgage.

[435] In June, 1781, Basnett became a bankrupt.

Lloyd and *Stanley*, for the plaintiff:

Where title-deeds are deposited as security for a debt, it is evidence of an agreement to mortgage, and amounts to an equitable mortgage against the debtor, and all subsequent

purchasers from him with notice of the deposit, *Russell* v. *Russell*, 1 Bro. R. 269, and the cases of *Featherstone* v. *Fenwick*, and *Hurford* v. *Carpenter*, *Ibid.* (note).

If the testimony of Basnett is credited, the defendant had actual notice of the deposit of the title-deeds of Massey's Lodge with Ellames.

There is other evidence to shew a constructive notice of both the deposits. Mr. Fluitt, an attorney, must have known that a mortgage without the title-deeds is nugatory, because liable to be postponed to any subsequent mortgagee having them. *Hobbs* v. *Norton*, 1 Vern. 136; *Peter* v. *Russell*, 1 Eq. Ca. Abr. 321; *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Head* v. *Egerton*, 3 P. Wms. 280. And this general doctrine is recognized in *Ryal* v. *Rowles*, 1 Ves. 360, and in *Goodtitle* v. *Morgan*, 1 Term Rep. 762. For if there is no sufficient excuse for not requiring title-deeds, it is considered as fraudulent, in order to enable the mortgagor to get money on the credit of those title-deeds.

Accordingly, the defendant inquired for the deeds on the 25th of June; he could not get them; Basnett promised to bring them to Chester, where the mortgage was to be executed; he broke that *promise; the defendant does not seem to have required, or [*436] Basnett to have given, any reason for not producing them. The fact seems to be, that the defendant having no other chance for getting payment of his debt, took this security, either knowing of the prior incumbrance, or purposely avoiding to make any inquiry from which he might have been fixed with such knowledge. But it is impossible this voluntary ignorance can screen him. *Smith* v. *Low*, 1 Atk. 490; *Moore* v. *Bennet*, 2 Ch. Ca. 246; *Mertins* v. *Jolliffe*, Ambl. 311.

Partridge, *Plumer*, and *Pemberton*, for the defendant:

Notwithstanding the decision of the Court, admitting the testimony of Basnett to be read, at least that testimony cannot have much weight when it tends to prejudice the defendant by proving a fraud committed by the witness himself. It has been held that a fact, positively denied in the answer, should be held not to be proved unless sworn to by more than one witness. 1 Ves. 66, 97, 125, *Pember* v. *Mathers*, 1

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Bro. R. 52. Here the defendant's son contradicts the testimony of Basnett, and is supported by the evidence arising from the transaction itself. It must therefore be taken that the defendant had no actual notice of the deposits.

As to constructive notice, the argument goes upon a presumption that it is absolutely necessary for a mortgagee to get the title-deeds: that is not true. The old cases, where a prior mortgagee not having the title-deeds was postponed, all went upon actual fraud proved in him, or such gross and wilful [*437] *negligence as was considered to be evidence of a fraudulent intention. It has indeed been said in a late case in the Court of King's Bench, *Goodtitle* v. *Morgan*, 1 Term Rep. 755, that the not getting the title-deeds from the mortgagor, alone amounts to that case of negligence; but that *dictum* was unnecessary to the decision of the case, and it proceeds on a supposition that the rule had been so established in the courts of equity: whereas Lord THURLOW, in the subsequent case of *Tourle* v. *Rand*, 2 Bro. R. 650, says, there is no such rule in equity, and accordingly decided that case in favour of the first mortgagee, who had not the title-deeds. Here the defendant was deceived by the mortgagor who pretended to be able to produce the title-deeds; he was induced to trust to these representations, because he had already advanced the money on the personal credit of Basnett, and was glad to get any additional security. This cannot be held a case of gross or fraudulent negligence, and therefore the legal title ought to prevail against either the prior deposit, or the subsequent mortgage. On the other hand, the plaintiff and Ellames are by no means clear of blame; they ought to have taken conveyance originally, and not have trusted to their equitable title: it is calling upon the Court to do that for them, which a careful man would have done at first for himself.

The deposit with the plaintiff, seems merely to have been intended as a pledge; for there is not any allegation of a promise to mortgage; and if there had, such a promise, not being in writing, would have been void by the Statute of Frauds.

[438] EYRE, Chief Baron:

The legal estate being in the defendant, the question is,

whether the plaintiff can raise a trust upon his estate, so as to gain priority for his own demand?

It is now fully settled, that a deposit of title-deeds, as a security for a debt, does amount to an equitable mortgage. If the plaintiff can prove actual or constructive notice of the deposit in the defendant, it raises a trust in him to the amount of that equitable mortgage. As to the evidence of actual notice, the testimony of Basnett alone, unsupported and opposed, is too weak to found a decree or even to direct an issue upon it. Swearing to the fraudulent intention of his own deed, he can expect little credit in a court of equity.

A great deal has also been said about constructive notice. Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shews a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it.

The only reason that can raise in this case a notion of constructive notice is, that the deeds were not forthcoming.

But is it possible that this circumstance can, of itself, be notice of the hands into which they are *fallen, or the purpose to which they have been applied? At the utmost it can only be a circumstance of evidence, to shew that there was reason for further inquiry; but being unsupported by any other circumstances, it proves nothing. [*439]

It is said, no man will advance money upon an estate without seeing the title-deeds, unless with a fraudulent intention.

I wish I saw, in a court of equity, some solid distinction established between a consideration which is an old debt, and a sum advanced *de novo;* there certainly is a great difference: in the one case the creditor jumps at any security he can get; he takes the deed of conveyance now, and trusts to getting the title-deeds afterwards; but till such a distinction is established, it is difficult to apply the reasoning which would belong to it.

The person who takes the legal estate without the deeds,

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in a case like this, appears to me, unless there be fraud, to be less blameable than he who takes the deeds without the estate.

Upon all the circumstances, I can see nothing in the case that amounts to constructive notice.

With respect to the general question, the effect of leaving the title-deeds in the hands of the mortgagor, the most intelligible rule, and in my opinion the most agreeable to justice, would have been to say, that if a man takes, as his security for his [*440] mortgage, a single deed, and leaves the other deeds *in the hands of the mortgagor, so as to enable him to commit a fraud, that he shall, in all such cases, be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains be more or less, the mischief is the same; and if I had found the rule so laid down I should have been perfectly satisfied. But it has been decided otherwise in the late cases, *Beckett* v. *Cordley*, *Penner* v. *Jemmat*,† and *Tourle* v. *Rand*, which establish the rule that nothing but fraud, or gross and voluntary negligence in leaving the title-deeds, will oust the priority of the legal claimant. As for the case of *Goodtitle* v. *Morgan*, the mortgagee must always risk there being an outstanding term, in which case the legal estate is out of him. The opinion of Justice BURNETT in *Ryal* v. *Rowles* when taken altogether and explained by the context, is not contrary to the rule that is now established.

The case of *Mocatta* v. *Murgatroyd* is a strong case: but I find no one that goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee as if he were guilty of fraud or wilful neglect.

In the present case, all the negligence, or all the activity in the world would have left the defendant in exactly the same situation in which he now is. He took this mortgage as the only security he could get; if it was already mortgaged, he was only where he [*441] was before: he seizes it as a plank to *save something: for as a second mortgage it was worth something.

The plaintiff having therefore failed in making out his case of fraud, either by actual or constructive notice, and the general

† 2 Bro. R. 652, n.

proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill must be dismissed with costs.

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EXCH. EASTER TERM.

OLIVER *v.* HAMILTON.

(2 Anstr. 453.)

1794. *June* 2.
[453]

MOTION to appoint a receiver of partnership stock and debts, in a suit by one against the other partners for embezzling.

The COURT thought that a receiver of the stock of a subsisting partnership, while the trade is going on, could not be appointed; unless upon the very grossest abuse; for it must destroy the trade.

Plumer and *Cooke* for the plaintiff.

Anstruther and *Alexander* for the defendant.

EXCH. TRINITY TERM.

RUTHERFORD *v.* MILLER.

(2 Anstr. 458—461.)

1794. *June* 25.
[458]

Bankruptcy of the plaintiff does not abate a suit in equity, and the bill may therefore be dismissed with costs for want of prosecution. And if the defendant becomes bankrupt, the plaintiff cannot dismiss his own bill without paying costs.

PARTRIDGE moved, that the plaintiff might be at liberty to dismiss his own bill without costs, the defendant having become bankrupt, and all hopes of obtaining the end of the bill being thereby defeated; and argued, that the bill abated by the bankruptcy. *Sellas* v. *Dawson*, in Chancery, 8th December, 1790.*

* SELLAS *v.* DAWSON.

In Chancery, 8*th December*, 1790.

The bill was filed in 1788, the answer in February, 1789. The plaintiff became a bankrupt in March, 1789, and in December following the defendant obtained an

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[*459]

Cooke, contrà, cited the case of *Bramhall* v. *Cross*, 1789, and *Davidson* v. *Butler*, 28th April, 1793, in which this Court decided, that proceedings did not abate by bankruptcy of the plaintiff, and the bills were dismissed with costs for want of prosecution.‡

order, as of course, to dismiss the bill with costs, for want of prosecution. The plaintiff now moved to discharge that order for irregularity, considering it to be such a bar at present as prevented the assignees from filing a supplemental bill.

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Lord THURLOW doubted whether he should discharge an order which seemed to be originally a mere nullity, because the plaintiff, being a bankrupt, could not continue the suit, and therefore could not be made to pay costs for not doing it.

At the third seal this was mentioned again, and the case of *Bramhall* v. *Cross* was cited, and *Waugh* v. *Austen*, 3 Term Rep. 437, in which it was held, that a suit does not abate by the bankruptcy of the plaintiff, and he was suffered to proceed to take out execution.

[*460]

Lord THURLOW was of opinion that it would abate in any stage prior to the judgment, and that the bankruptcy of a sole plaintiff so far put an end to the suit, that the assignees could not add to the suit by a mere supplemental bill, but must file another original bill, in the nature of a supplemental bill. *Harrison* v. *Ridley*, Com. R. 589, Mitf. 62. His Lordship admitted, however, that in the case of an injunction, the defendant may move that the assignees of a bankrupt-plaintiff may file their bill within a limited time, or else the injunction to be dissolved.

14th January, 1791, *Abbot* renewed his application to have the order of dismissal discharged.

Lord THURLOW said, he could not make an order to discharge the former order, because that would acknowledge that there could be any order made after a bankruptcy, and when the suit, as he conceived, was abated. He thought it was abated by analogy to abatement at law, which always takes place on a bankruptcy before judgment either final or interlocutory. *Monke* v. *Morris*, 1 Mod. 93. He added, that notwithstanding the Exchequer precedents, this was an improper order to have been made originally, and improper to be noticed now, and that it was a mere nullity. His Lordship stated it as a general rule, that bankruptcy before judgment or decree, was equally an abatement in equity and at law; and observed that the case in 1 Atk. 263, where Lord HARDWICKE is made to say, that it was no abatement, *is ill reported, and that the order, which had been examined, did not warrant the report. He added, that the assignees should now file their supplemental bill, which would take up the proceedings from the very date of the bankruptcy, and so totally oust this intermediate order.

The motion, to discharge the order for dismissing the original bill for want of prosecution,

Was accordingly refused.

‡ This case of *Davidson* v. *Butler* was a bill for an injunction against proceeding at law, on a promissory note; and to have it delivered up.

Abbot moved to dismiss the bill with costs, for want of prosecution.

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MACDONALD, Chief Baron:

I remember those cases very well. It was formerly held otherwise; but the point has been fully gone into. Indeed, it seems to me impossible, that where a plaintiff files a groundless bill, he should be at liberty to escape without paying costs.†

DAUBIGNY AND OTHERS v. DAVALLON AND OTHERS.

1794. *June* 25.

(2 Anstr. 462—469.)

[462]

Plea of alien enemy is good to a bill for discovery.

Such a plea stating this nation to be at war with the government of France, and that the plaintiffs are Frenchmen, aliens, and enemies of the King, is sufficient.

THIS was a bill for discovery of goods received by the defendants as agents for the plaintiffs, stating such discovery to be necessary for supporting actions at law intended by the

Cooke shewed for cause, against this motion, that the plaintiff was become bankrupt since the filing of the bill, and relied on the case of *Sellas* v. *Dawson*.

Abbot cited the case of *Bramhall* v. *Cross*, and another late case in the Exchequer where similar orders were made.

MACDONALD, Chief Baron:

I should have no doubt upon the subject, but for the opinion of Lord THURLOW in *Sellas* v. *Dawson*. That case is founded on an idea that bankruptcy of the plaintiff abates a suit, but in this Court the rule is clearly established the other way; and that accounts for the difference of practice herein dismissing bills in this situation. It is clear that at law there is no abatement, and the same rule ought to be followed in courts of equity; for the right to have a bill dismissed with costs, for want of prosecution, is the only protection to a defendant from being harassed by suits that are afterwards abandoned; *and the practice of this Court has always been accordingly. [*461]

THOMSON, Baron:

I take the constant practice to be, that the assignees of a bankrupt, in order to take advantage of a suit commenced by him, file a supplemental bill, and not a bill of revivor; but if the suit was abated, it would be necessary to revive. If the assignees think the suit beneficial, they may take it out of his hands; if they decline doing so, there is no reason why the defendant should not have his costs. In this case the assignees have nothing to do with the suit. It will be time enough for them to litigate the claim of the defendant when he offers to prove it under the commission.

Cooke then offered to undertake to speed the cause, to prevent its being dismissed.

This the Court refused; and the

Bill was dismissed with costs.

† See *Levi* v. *Heritage*, 26 Beav. 560, where the intermediate cases are cited.—R. C.

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[*463]

plaintiffs to be brought for recovering the value of the goods. The defendants severally pleaded, "that at and before the time of exhibiting the said bill of *complaint, there was and still is an open war between our lord the now King, as King of this realm, and the persons now exercising the powers of government in France; and that the plaintiffs are Frenchmen, alien enemies of our lord the King and his crown of Great Britain, and now are, or lately were, resident at Lyons, or some other part of the dominions of France, under the obedience of the persons so exercising the powers of government there; and that those persons, as well as the plaintiffs, are alien enemies of our lord the King, and his crown of Great Britain."

Plumer, *Johnson*, and *Pemberton*, for the different defendants, argued in support of these pleas:

By the original common-law of this country, no alien had a right to sue in the King's Courts. This disability is now confined to alien enemies, 2 Str. 1082; but as to them, holds as strongly as ever. *Wells* v. *Williams*, 1 Ld. Raym. 283; *Anthon* v. *Fisher*, Doug. 650 n. He cannot even sue for a discovery; for discovery is only granted where the plaintiff shews an interest; but here, notwithstanding the discovery, he cannot recover; and the discovery would therefore be useless. By the statute 34 Geo. III. c. 9, s. 7, it is even penal to pay him any demand, as residing in France.

Pigott and *Steele*, for the plaintiffs:

The case in Douglas, determined by the judges in the Court of Exchequer Chamber, relates merely to suits for relief, and is confined to the case of a right claimed to be acquired by an alien
[*464] enemy in actual war, as *a ransom-bond; and does not apply to the case of discovery, or of rights acquired in commercial transactions before the war. The right of alien enemies to sue can, at most, only be suspended during the war: when the war ends, they will be entitled to relief; and with licence from the King, they may sue now; the discovery sought is not therefore immaterial. In 3 Burr. 1741, *Mr. Dunning* cited a case where

Lord HARDWICKE over-ruled a plea of alien enemy to a bill for an account.

In point of form the plea is defective. * * The forms of pleas in bar, of this kind, universally contain an averment that the plaintiff was born at some place in the territories of another state, and out of the allegiance of the King. *Calvin's* case, 7 Co. Str. 1082. * * *

On the Act of this session nothing can turn; that Act points [465] out a particular mode of stopping suits of men residing in France, namely, by application to a judge, who is enabled to stop the proceedings on such terms as he shall think fit: sec. 7. That was attempted here, and refused; if granted, it probably would be on the terms of giving a full discovery and security.

MACDONALD, Chief Baron:

I refused to stop the proceedings in this suit, because I was not satisfied of the question, whether a bill of discovery is within the meaning of the provisions of the Legislature, or of the general disability of alien enemies. There appeared to me to be a great difference between suits for relief, and those which only aim at obtaining evidence, and are preparatory to the real suit.

Plumer and *Johnson*, in reply:

The disability to sue is general,—that no alien enemy shall have the benefit of the King's Courts; and the distinction was never taken between these suits for obtaining evidence and any other. * * The case cited by *Dunning* is certainly wrong: if a [466] suit for an account lies, the general order for payment of the balance must be made upon it, and the distinction of an alien enemy is at an end.

As to the point of form, it is not true that a plea in equity must observe the same strictness as at law. At law, many of the facts, as the place of birth, may be under a *videlicet*, and therefore need not be proved. In equity, the plea is sworn to be true, and is therefore only to contain the essential parts which are to be proved.

The word Frenchman implies that the plaintiff is by birth one of that nation, and the additional averment of alienage

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negatives the possibility of his being born of English parents. It is not averred that the plaintiff adheres to the King's enemies; but it is said that he lives under the obedience of the King's enemies, and is himself an enemy of our lord the King, which is tantamount to such an averment. The substance therefore is the same as in the precedents at law, and the same technical expressions have never been expected in equity.

July 8.

MACDONALD, Chief Baron, this day delivered the opinion of the Court

Objections have been taken to this plea in point of substance, [*467] as well as *to the form in which it is pleaded. It has been insisted that the plea of alien enemy applies only to those suits in which relief is sought, and not to mere bills for discovery.

However the law may originally have stood, it is now settled that alien friends have a right to institute suits in the King's Courts for recovery of their rights; they come into this country either, as was formerly the case, with a letter of safe-conduct, or under a tacit permission which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of this kingdom. But if the right of suing for redress of the injuries they receive were not allowed them, the protection afforded would be incomplete, and merely nominal.

This claim to the protection of our Courts does not apply to those aliens who adhere to the King's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity.

A doubt had at first arisen, whether suits for discovery were not in their nature an exception to this rule; but we are now satisfied that no real distinction exists. The disability to sue is personal: it takes away from the King's enemies the benefit of his Courts, whether for the purpose of immediate relief, or to give assistance in obtaining that relief elsewhere. Perhaps the discovery obtained here may be made available by a suit abroad; [*468] the *same reason therefore applies against the auxiliary as against the principal suit.

In Stamford Prerog. 39, Dyer 2 b, the rule is laid down in general terms as to all suits. The case cited by *Mr. Dunning*, as decided by Lord HARDWICKE, is too loose a note to deserve much attention; it might be decided upon other grounds, or upon restrictions which do not appear. We do not know enough of that case to rest anything upon it.

The objection in form is, that the plea does not state the plaintiff to have been born out of the liegeance of the King, and within the liegeance of a state at war with us. The precedents certainly are in that form, Rast. 405 a, 252, 1 Show. 349; and it seems of the essence of the plea, that these facts should appear. But the question is, whether these facts are not in substance sufficiently averred in this plea. They are stated to be Frenchmen, aliens, and enemies to the King; now the word alien is a legal term, and amounts to as much as many words; an alien must be *alien né*, Litt. s. 198. It implies being born out of the liegeance of the King, and within the liegeance of some other state. The word Frenchmen shews that they are the subjects of a nation stated to be at war with our King; and the averment, that they are enemies of our lord the King, is the same thing as if the plea had said that they adhere to his enemies. These three words, therefore, Frenchmen, alien, enemies, seem to contain every material alteration necessary *in such plea, although [*469] perhaps it would have been better not to depart from the precedents in the books. The Court being of opinion that the plea is sufficient upon this ground, it becomes immaterial to consider the effect of the late statute upon the present case.

MARSH *v.* ROBINSON.

(2 Anstr. 479.)

1794.
July 2.
[479]

THE defendant put in his answer on affirmation without oath, as being a Quaker.

Hollist, for the plaintiff, obtained a rule to shew cause why it should not be taken off the file, on the ground of his not being a Quaker.

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Piggott shewed cause against this rule, and was proceeding to prove the fact of his client being a Quaker——

Per CURIAM:

It is unnecessary; by filing his answer as a Quaker without oath, he undertakes that he is a Quaker; if he were indicted for perjury upon it, he would not be permitted to contradict this assertion.

EXCH. MICHAELMAS TERM.

1794.
Nov. 11.
[497]

REES *v.* PARKINSON.

(2 Anstr. 497.)

The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought this bill to foreclose; this is regular, and the Court will not stop the proceedings at law, unless the defendant brings in the money.

JOHNSON moved to restrain the plaintiff from proceeding at law. The plaintiff, a mortgagee, had got possession by an ejectment, had brought an action at law on the covenant to repay, and was proceeding in this suit to foreclose; he argued that the proceeding of the plaintiff in three suits for the same money, was highly vexatious; that the Court might, by 7 Geo. II. c. 20, s. 2, exercise their discretion, as if the cause were come to the hearing; and that the present was a case proper for the exercise of their discretion.

Per CURIAM:

The plaintiff is regular in his proceedings; we cannot deprive him of the benefit of his action, unless the defendant will bring in the money.

EXCH. HILARY TERM.

DE GIOU *v.* DOVER.

(2 Anstr. 517—518.)

1795. *Jan.* 27.

[517]

If the plaintiff is nonsuited by mistake of a witness in the most material part of the cause, a new trial ought to be granted.

THIS was an action against the owner of a stage-coach, for the loss of the plaintiff's goods above the value of five pounds, which were entered to go by the coach. The coach set out from the "Swan with Two Necks" in Lad Lane, at which there is a board stuck up to give notice, that the proprietors will not be responsible for any parcel above the value of five pounds, unless entered and paid for accordingly. The goods were entered at the Gloucester coffee-house in Piccadilly, which is a receiving-house for this and many other coaches. No intimation was given to the plaintiff that this was not the original office of the coach. The book-keeper of the Gloucester coffee-house swore at the trial, that there was not in his office any notice *similar to that in Lad Lane. A verdict was accordingly found for the plaintiff. [*518]

Plumer and *Dauncey* moved for a new trial, on an affidavit of the book-keeper, that he had been mistaken at the trial, and that such notice had been fixed up in his office.

Piggot and *C. Moore* objected that this would be a new trial merely to supply a defect in the evidence, which the defendant ought at first to have provided against.

MACDONALD, Chief Baron: *Jan.* 31.

Since the argument of this case, we have consulted with Lord KENYON and several of the other Judges as to the practice, and we find, that where an evident mistake has happened, it is usual to grant a new trial.

An affidavit was then produced on the other side, that the

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De Giou v. Dover.

notice at the Gloucester coffee-house was so small, and so obscurely placed, as to be scarcely discernible.

The Court, however, thought that this point, being the most material in the cause, ought to go to the jury.

1795.
Feb. 27.
[527]

SMITH and Another *v.* BURNAM.

(2 Anstr. 527—529.)

By the terms of an auction, the title-deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection; he cannot afterwards, on disliking the title, object to the delay.

The plaintiff Waldo sold an estate by auction; the defendant was the highest bidder; by the terms of the sale a certain sum was to be deposited immediately, and the rest of the purchase-money to be paid, or security given, by a certain day, on a good title being produced. The deposit was made with plaintiff Smith the auctioneer. On the day fixed, Waldo did not produce his title, but did a few days afterwards; the defendant did not then object to the delay, but took the abstract of the title, and examined it. Upon inspection he found that the premises were the [*528] subject of a suit then *pending; he therefore refused to complete his purchase, and brought an action against the plaintiff, the auctioneer, to recover the deposit. The present bill was filed for an injunction to restrain proceedings in that action, and to obtain specific performance of the agreement.

Richards now moved for an injunction, on the ground that the agreement was still subsisting in full force; and therefore, although the purchaser must recover at law, the title not having been produced on the day fixed by the terms of the purchase, yet in equity he ought not to be allowed to take that advantage. In equity the time is never considered as of the essence of a contract; and besides, his conduct in examining the title without any objection as to the time, waives that pretence. Then, any defect of title he may pretend to have discovered, is a question to be

determined at the hearing; till the validity of his objection to it is determined, he cannot be judge in his own cause, and rescind the contract. The proceeding to take advantage of his strict legal right would have that effect.

Fonblanque, contrà:

The defendant in his answer says, he would not have taken any objection to the delay if the title had been good; he found it bad, and does take the objection on the ground of the delay; this can never be considered as a waiver of his right to consider the agreement as at an end. It is expressly declared in *Pincke* v. *Curteis*, 4 Bro. R. 332, that on sales by auction, if the vendor does not comply with the terms of sale *at the day fixed, the [*529] vendee may consider the agreement as concluded, and demand his deposit. Besides, it appears here that the title is bad upon the face of it; the abstract admits the validity of the title to depend on the event of a suit. A Court of Equity will never compel a bidder to complete his purchase where he buys a lawsuit with it. *Cooper* v. *Denne*, 4 Bro. R. 80.

MACDONALD, Chief Baron:

The defendant did not make any objection as to the delay, when the abstract was presented to him; by proceeding to examine it he goes on in pursuance of the agreement, and waives the objection. The validity of the title cannot be determined in this stage of the cause; nor can the defendant determine that question. To allow him to proceed on the action would be to let him rescind the contract.

The COURT granted the injunction on the deposit being paid into Court.

1795.
Feb. 27.

[533]

STONE *v.* LIDDERDALE AND OTHERS.

(2 Anstr. 533—542.)

An assignment of the half-pay of an officer in the army is bad in equity as well as at law.*

W. BENYON, in consideration of 120*l.* paid by him to the defendant Lidderdale, obtained from him an annuity of 20*l.* for the defendant's life; and for securing the payment thereof, the defendant assigned to him all right or interest which he had, or might have, to half-pay as a reduced officer in the army; and thereby granted to him a power of attorney, irrevocable, for receiving the same. This annuity and security were assigned by Benyon to the plaintiff. The defendants, the paymasters of the forces, had refused to pay over to him the half-pay of the defendant Lidderdale, in consequence of a countermand of the letter of attorney, and an action brought against their predecessors, the Duke of Montrose and Lord Mulgrave, by the defendant Lidderdale, to obtain payment of the half-pay to himself; in which action he recovered. *Vide* 4 Term Rep. 248.† This bill was filed to have the effect of this assignment as a security for the annuity.

[534]

Plumer, *Stanley*, and *Fonblanque*, for the plaintiff, argued, that the assignment, although it could not be enforced at law, as being no certain right, but depending on the gratuitous bounty of his Majesty, was yet good in equity. A transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. Thus, the chance of a presumptive heir to outlive his ancestor, and inherit his estate, may be sold. *Hobson* v. *Trevor*, 2 P. Wms. 191. So the sale of an expectancy of a legacy by the will of a person then living is binding. *Beckley* v. *Newland*, 2 P. Wms. 182. And it is adopted as a general rule in equity, that a possibility may be assigned. *Wright* v. *Wright*, 1 Ves. 409. And the same rule is confirmed by the case of *Jones* v. *Roe*, 3 Term Rep. 93.‡

Accordingly, it was held in *Crouch* v. *Martin*, 2 Vern. 595,

* *Willcock* v. *Terrell* (1878) 3 Ex. D. 323, 329.

† 2 R. R. 375.

‡ 1 R. R. 656.

that the future wages of a seaman were assignable; and this receives a legislative confirmation with regard to the pay of the navy, by the 1 Geo. II. st. 2, c. 14, which enacts, that, for the future, such assignments shall be void. The same determination has been adopted both at law and in equity, as to the assignments of the half-pay of officers in the army. The case of *Grainger* v. *Wyvill*,† heard twice before Lord King, first in August, and again in October, 1728, was an application to sequester the half-pay of an officer in the hands of the treasurer of the navy. The CHANCELLOR, after much deliberation, granted the application: he said, the first time that money had been sequestered in the hands of the public officers, was *in a [*535] case before the MASTER OF THE ROLLS, who ordered half-pay in the hands of the treasurer of Chelsea Hospital to be sequestered; and accordingly Lord KING laid it down as a rule that half-pay should be considered liable to sequestration. This negatives the existence of any rule in equity to retain the half-pay unalienably to the officers.

So, in *Stuart* v. *Tucker*, 2 Bl. R. 1137, an assignment of half-pay of an officer was held good. In the case of *Gomez* v. *Graham* there cited, Lord HARDWICKE established the same point, and reversed the decree of the Master of the Rolls to the contrary. The case of *Yates* v. *Elliott*, also cited in the case of *Stuart* v. *Tucker*, was ruled in the same manner by Lord MANSFIELD. And in the case of *Spencer* v. *Cox* and *Drummond*,‡ 1773, Lord

† This case was cited from Mr. Hargrave's MSS.

‡ In that case the plaintiff had bought an annuity from an officer on full pay, secured by bond and judgment, and by an assignment of his pay, with notice to the defendants, the agents of the regiment, to pay it over to the plaintiff accordingly. The assignor being abroad on service in West Florida, the plaintiff demanded payment of the arrears from the defendants. They objected till they should hear from the regiment that he had not taken up his pay abroad. The plaintiff filed this bill. The defendants proved, that by the rules of the army the officers are at liberty to take up their pay from the regimental paymaster abroad, and that the agent is answerable over to him. His Honour, however, decreed, that they should pay the money in their hands in discharge of the arrears, and also the growing payments of the annuity out of such moneys as they should receive on account of the assignor.

The CHANCELLOR varied the decree, by ordering them to discharge the annuity only out of what should remain in their hands after the demands of the paymaster.

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BATHURST affirmed a decree of the Master of the Rolls upon the same principle. * * *

[The cases which have since been determined at law, are distinguishable.

Besides, an assignment of a chose in action is always bad at law; and this would have been a sufficient reason for those decisions.]

[537] *Romilly*, for the defendant:

It seems formerly to have been the opinion of the Courts that half-pay was assignable, and while that opinion remained, no distinction was ever taken between the rule of law and equity. By *Stuart* v. *Tucker* it appears that if assignable at all, it is equally so in both Courts; and accordingly the subsequent decisions restraining such assignments have never hinted at any such distinction. The first case so decided was that of *Cathcart* [*538] v. *Blackwood*, upon an appeal from *the Court of Session in Scotland to the House of Lords, 25th of February, 1765. * * In the case of *Flarty* v. *Odlum*,† the sole ground of decision was the illegality of such assignments, on the score of public policy. Similar cases are there cited in the Courts of Common Pleas and Exchequer. The principle is followed in the case of *Barwick* v. *Reade*,‡ in the Common Pleas, and is again expressly recognised and adopted in the decision of the action at law between the present parties. * * The ground of public policy is in general a good ground of defence in equity. * * *

Half-pay is granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, nor be by any circumstances reduced to extreme poverty. The allowing it to be assigned defeats this purpose. * * *

[539] MACDONALD, Chief Baron:

* * The case is of considerable consequence, and the decisions appear contradictory; the Court will look into them.

† 1 R. R. 791. ‡ 2 R. R. 808.

The judgment of the COURT was this day delivered by the CHIEF BARON.

He stated the case:

For the plaintiffs, it has been argued as a general principle, that a matter in expectancy, although not assignable at law, may be assigned in equity. The cases of *Hobson* v. *Trevor*, *Wright* v. *Wright*, and all that class of cases, have been cited to prove this position; and certainly, as a general rule, it must be admitted to be true.

Then they argue that the present case is no exception to that rule, and rely on the Act 1 Geo. II. st. 2, c. 14, as proving the pay of the navy to have been assignable before that time. [540]

The only case upon the subject prior to that Act, was the case of *Crouch* v. *Martin*, 2 Vern. 595. There the Court held, that a seaman's wages were assignable for valuable consideration; and the ground of the decision was, that the consideration given was in reality a payment by advance of the wages, and that therefore they were not to be paid over again. It does not appear that the Court there took at all into consideration the intention of the Legislature upon the subject.

The statute referred to does not seem to have had this decision in contemplation. It is not confined to pay only, but extends to every other claim of the seamen, and provides against their being defrauded of the rights which had accrued, or might afterwards accrue to them. The purview of the statute is to guard them from frauds of every kind. No inference can therefore arise of the opinion of the Legislature as to this particular question.

The cases of *Stuart* v. *Tucker*, in Blackstone's Reports, and *Gomez* v. *Graham*, there cited, are more directly in point. The cases of *Grainger* v. *Wyvil*, and *Spencer* v. *Cox* and *Drummond*, have also been cited.

The three last are cases of whole pay. In that of *Stuart* v. *Tucker*, the distinction is taken between whole and half-pay: and it is observed by the *CHIEF JUSTICE, that if whole pay is [*541] assignable, *à fortiori* half-pay must. In *Granger* v. *Wyvil*, Lord KING was at first against the sequestration, although by the nature of the application that could only relate to pay then actually due; he at last granted it with reluctance. In the case

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of *Spencer* v. *Cox* and *Drummond*, Lord BATHURST shewed equal reluctance to break through the rules of public policy, and doubted much before giving his decision.

Half-pay is intended by the state to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may always be ready to return into actual service.

It materially differs, therefore, from the general case of expectancies, which certainly may in equity be assigned. By such assignment no public interest is thwarted. Thus a pension is equally uncertain as half pay; but as no future benefit is meant to arise to the state from granting it, a material distinction arises between them.

The case of *Stuart* v. *Tucker* seems to consider half-pay only in one point of view, as a reward for past services; but that evidently appears not to be the real intent of the Legislature. In that case, Mr. Justice GOULD refers to the case of *Oliver* v. *Ennfonne*, in Dyer; it is not there said for what purpose; but when we recollect, that the same Judge concurred in the contrary decision of *Barwick* v. *Read*, 1 H. Blackst. 627,† and again cited the same case from Dyer in corroboration of the latter Judgment, [*542] *for which it is a strong authority, we cannot hesitate in seeing that it must have been cited by him on the former occasion as raising a doubt of the judgment then given.

That case in Dyer, and the decisions in both the other Courts, in questions similar to the present, fix the true principle of law upon the subject. The Courts of Justice are not indeed to enter into any general abstract notions of public policy in their decisions, in opposition to the express intention of the parties; but in deciding upon the nature of a public grant, the great object of public policy in making that grant is to be attended to. The general intent pervades the whole; each yearly payment is subject to it; perhaps it may be more strong where the gratuity is annual, as in the present case.

The cases of *Flarty* v. *Odlum*, *Lidderdale* v. *the Duke of Montrose*, and *Barwick* v. *Read*, decide the present.

As in the case put in Dyer, the annuity granted to a man on

† 2 R. R. 808.

his being created a Duke, for support of his dignity, could not be granted over; so the half-pay, being given for a similar reason of public policy, cannot be transferred; to use the words of my Lord Dyer, "it is incident to the cause for which it was granted," and cannot be separated from it.

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The plea was allowed.

GABBIT *v.* CAVENDISH.

(2 Anstr. 547.)

1795. *Feb.* 28.
[547]

THE defendant being sued as executor, admitted to have in his possession certain books, containing the accounts of the estate. He was ordered to deposit them in the hands of the Deputy Remembrancer, for the inspection of the plaintiff. It was afterwards referred to that officer to take an account of the estate. The defendant, in order to make out such account, applied to be allowed to inspect and take copies of the books. This was refused at the office, unless he would pay for office copies.

Cooke now moved that the defendant might have this liberty as his right.

The motion was allowed.

EXCH. EASTER TERM.

SIR JOHN PECHEL, BART. *v.* FOWLER AND OTHERS.

(2 Anstr. 549—550.)

1795. *April* 21.
[549]

On a trust to sell, a suggestion in the bill of improper conduct of the trustees in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale.

THE plaintiff filed this bill against the defendants, stating certain mortgages, and a conveyance of his estate to the

1795.
PECHEL v. OWLER.

defendants, in trust to sell; that the defendants had advertised the premises for sale; that the notice of the intended sale was much shorter than usual; and several circumstances, which tended to shew, that, by the sale, if made, the plaintiff would sustain great loss.

As soon as the bill was filed, *Plumer*, for the plaintiff, moved for an injunction to restrain the sale, upon an affidavit verifying the facts stated in the bill, and stating, that the sale was to be made next day.

[550] The COURT refused the injunction, as not being one of the cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a breach of trust, in making the proposed sale, they will be answerable to the plaintiff for the damage sustained.

1795.
April 24.

WOOLLEY *v.* DRAGE.

(2 Anstr. 551.)

[551]

Money disbursed by a mortgagee shall carry the same interest as the original sum.

BILL to redeem a mortgage. It was referred to the Deputy Remembrancer to take the usual accounts. The principal money lent, carried 5 per cent. interest. The mortgagee being in possession, had advanced money for fines on renewals of leases, under which the premises were held. Upon these sums the Deputy Remembrancer allowed only 4 per cent. interest. Exceptions being taken,

The COURT allowed the exception. The interest upon the advances must be regulated by the interest payable upon the money originally lent.

Shuter and *Short* for the plaintiffs; *King* for the defendants.

EXCH. TRINITY TERM.

1795.
June 23.

[572]

PHILIPS *v.* DAVIES.

(2 Anstr. 572—574.)

Action to try a right of way, which was stated to be from a certain highway leading from the parish of L. to B. The highway was proved to be, at that part, within the parish of L. This is no variance.

THIS was an action on the case, to try a right of way. The way was described in the declaration to be "from a certain public highway leading from the parish of L. to B. into, through, and over the defendant's close," &c. At the trial of the cause before Mr. Baron THOMSON, at the last assizes for Gloucestershire, it appeared, that the highway stated as the abuttal of the way claimed was, at that part where this private way joined it, within the parish of L. This was objected at the trial, by the defendant's counsel, as a variance, the word "from" being exclusive, and therefore not supported by the evidence. The judge directed a verdict for the plaintiff, with liberty to move the *Court for a nonsuit on the point reserved. A rule to shew cause [*573] why the verdict should not be set aside, and a nonsuit entered, having been obtained, cause was this day shewn by

Milles and *Russell:*

In describing the way claimed, or in indicting a way, the most scrupulous exactness is requisite, and every technical rule of setting it forth must be complied with. But where a way is mentioned collaterally in pleading, as the abuttal of the principal subject, the same precision is not necessary. *Harrison* v. *Rooke*, Palm. 421. In such cases, it is sufficient if the Court can see from the evidence, that it is the same highway with that stated in the declaration. To describe the highway at full length, it should be stated to be "in, through, and from the parish of L.;" but any part of that description which ascertains the identity of the road is a sufficient description of an abuttal.

1795.

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Plumer and *Lane, contrà*:

It is immaterial to enquire whether the plaintiff was bound to set forth the *termini a quo et ad quem* of the highway. He has undertaken to do so, and therefore must do it accurately. *Rouse* v. *Bardin*, 1 H. Blackst. 354; *R.* v. *Gamlingay*, 3 Term Rep. 514; *Bristow* v. *Wright*, Doug. 667-8. But it has always been held that "from," in the description of a way, is exclusive of the *terminus a quo*. *R.* v. *Gamlingay*, and the cases there relied on by the Court. Then the evidence, that the highway is within the parish of L. is a variance from the declaration. This cannot be the same highway as that stated to lead from the parish.

[574] MACDONALD, Chief Baron:

I cannot bring myself to entertain a doubt upon this subject. There is a great fallacy in resting solely on the word "from" in this case. In strict technical language, "from" is generally held to be exclusive: but, in common discourse, a way "leading from" a parish, may well be partly in it. If pursued, the road will lead a traveller from the parish. This does not necessarily mean, that it commences at the extremity of the parish. The plaintiff has undertaken to describe the highway, but this must be understood with reference to the subject, with such certainty as is requisite in describing an abuttal. The defendant has here a sufficient notice what he has to oppose, and that is all that he can require.

The other Barons being of the same opinion,

The rule was discharged.

LYGON *v.* STRUTT.

(2 Anstr. 601—602.)

1795. *July* 11.

[601]

A book found in the herald's office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact.

Where a title to tithes in a layman is clearly made out, though not supported by possession, the Court will decree an account without an issue.

THIS was a suit for tithes of common lands, inclosed by a late Act of Parliament, lying in the forest of Duffield, in the county of Derby. The plaintiff, the impropriate rector, derived his title from the College of Newark. The defendants *insisted, that the [*602] place was extra-parochial, and that the tithes of the forest had formerly belonged to the Abbot of Tutbury, had come to the Crown on the dissolution of that monastery, and had since been granted to the tertenants. They produced an ancient manuscript, found in the herald's office, purporting to enumerate the possessions of the monastery, and giving an account of the title to these tithes. The counsel for the plaintiff protested against their right to produce this evidence, but consented to admit it.

In giving judgment in the cause, the COURT said that this book could not have been received in evidence, but by consent.

The COURT, upon the whole case, thought it perfectly clear, from the ancient documents, as well as from a great preponderance of modern circumstances, and of evidence of reputation, that the place in question was within the parish and rectory of Duffield; and although the land-tax for this part of the parish was separately assessed; although there were many instances of refusal of tithes, and no continued or clear possession; and although there was some contradictory evidence as to reputation; yet the Court decreed in favour of the plaintiff without an issue, and directed an account.

1795.
July 11.

[603]

THE ATTORNEY-GENERAL *v.* RICHARDS.

(2 Anstr. 603—616.)

Where a nuisance and purpresture in a harbour are committed, an information in equity lies to abate it.

Where there is a grant from the Crown of land to be recovered from the sea, and it is left unembanked for a long space of time, as a common passage for ships over it, the right of the Crown revives by the length of possession by its subjects.

THIS information stated, that by the royal prerogative, the sea and sea-coasts, as far as the sea flows and reflows, between the high and low water-marks, and all the ports and havens of the kingdom, belong to his Majesty, and ought to be preserved for the use of his Majesty's vessels, and others, and that his Majesty has the right of superintendency over them, for their preservation.

It then stated, that the defendants, in 1784, erected a wharf or key, two docks, and other buildings, between high and low water-mark, in Portsmouth harbour, adjoining to Gosport, so as both to prevent the boats and vessels from sailing over that spot, or mooring there; and also to endanger further damage to the harbour, by preventing the free current of the water to carry off the mud. The information therefore prayed, that the defendants might be restrained from making any further erections, that those made might he abated, and the harbour restored to its ancient situation.

The defendants claimed to hold the soil of the place in question, under letters-patent, 14th July, 4 Ch. I. These letters-patent recited, that a commission had issued to the sheriff of Hampshire, and other persons, to examine all the mud-banks and sea-marshes, within a certain district, on the coast; and, by a legal inquest, to inquire and report, whether any, and what part [*604] of them, might be recovered *from the sea, without injury to any person. They made a return, certifying, that certain mud-lands, and lands covered with the sea, around the town of Gosport, might be recovered from the sea, to the great benefit of the nation, and without injury or damage to any person. The letters-patent on the foot of this return, and in consideration of

the services of the grantees, and of the money to be by them expended in recovering from the sea the lands granted; of the special favour, certain knowledge, and mere motion of the King, did grant to Mary Wandesford and William Wandesford certain mud-lands, and lands overflown with the sea, (among others, certain lands overflown with the sea on each side of Gosport, and there fully described,) and also discharged the same from all claim of tithes from the Crown, during seven years from the date of the lands being recovered and embanked from the sea, rendering a rent of 4*d.* per acre for every acre recovered till the year 1630, and from that period, the rent of 1*s.*

Two of the defendants also pleaded possession of the place in question for more than sixty years.

It was much disputed, upon the evidence, whether the place in question was included within the grant, or not? The defendants did not produce the conveyances, and the deduction of title from the Wandesfords, to the persons from whom they derived immediately their claim. They only produced the conveyance of this parcel of mud-land to themselves, by persons stated in the conveyance to be entitled under the letters-patent.

It was admitted, that the defendants, or those under whom they claimed, had had possession of a piece of mud-land adjoining to the piece in question, for upwards of sixty years. The ground in question had never been recovered from the sea, till the erections complained of by the bill, and which were made after notice of the intention to dispute the right; but the defendants had had possession, by keeping floats of timber moored there, for some time before. [605]

It was proved, that the embankment was highly prejudicial and dangerous to the harbour, and that it was peculiarly hurtful to the town of Gosport, by preventing boats from coming immediately up to the town, on that side, as formerly.

This case was argued during the Term by

The *Attorney-General* and *Solicitor-General, Alexander, Campbell,* and *Percival,* for the Crown. The *primâ facie* right of the Crown to all ports and arms of the sea, and to the soil thereof, is clearly established. The nature of that right is explained by

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Lord Hale, in his treatises "De Jure Maris" and "De Portibus Maris." † It is there shewn (p. 12), that the King has the soil of the sea-coasts and havens, and entitled to the profits thereof as a *jus privatum;* and so far as it is considered in that light merely, he may grant it away. But he has also (pp. 81, 83, 88, 89) another right in the arms of the sea, the right of a free passage [*606] for all his subjects, and *others, and of having all havens, and branches of the sea, preserved from nuisances for that purpose. This is a right similar to the King's property in highways, a mere *jus publicum* vested in the King for the use of the subjects. This, by its nature, is unalienable, and shall prevail against any claim set up against it. Lord Hale, "De Jure Maris," 12; "De Jure Portibus," 85.

Where any invasion of the *jus privatum* of the Crown, in arms of the sea, or ports, takes place, by encroachment on the soil, it is a purpresture. Glanville, l. 9, c. 11; Spelm. Gloss. Purpresture. Where the *jus publicum* is violated, it is a nuisance; and it frequently happens, as in the present case, that a nuisance in a port is accompanied with a purpresture, or encroachment on the soil of the Crown.

All nuisances may be abated by the mere act of any individual; but in the case of the Crown, the more proper and decorous mode of proceeding, is by information in a court of justice, for ascertaining the right. This may be done by information in equity, as well as at law; and the nuisance may be decreed to be abated.

In the case of a purpresture, the same mode of proceeding has been held proper. In case of a decree for the Crown, an inquiry is directed, whether it be most beneficial for the Crown to abate the purpresture, or to suffer the erections to remain, and be arrented. Where the purpresture is also a nuisance, the Crown has not this election; for it cannot sanction a nuisance.

[607] In the case of the *Attorney-General* v. *Philpot*, in this Court, 8 Ch. I. the information stated the Crown to be seized of the river Thames where navigable and an arm of the sea, for the use of the ships resorting there; and that the Crown was also seized of

† See Mr. Hargrave's Law Tracts.

the soil between high and low water-mark: that the defendants had lately encroached upon the soil of the King, and had thereby stopped the course of the river, and rendered it less convenient for shipping, and for their mooring in the pool. The information therefore prayed, that the encroachment might be declared a purpresture, and be abated as such. The defendant set up a defence, that they had had the leave of the High Admiral, and that their encroachment was no damage to the shipping. The Court declared, that purprestures on navigable rivers ought to be abated. They accordingly directed a commission to inquire, whether the fact complained of was a purpresture. The Commissioners returned that it was, and the encroachment was abated.

So in the case of *The City of Bristol* v. *Morgan*, cited in Lord Hale's treatise "De Portibus Maris," p. 81. The bill stated the benefit of navigable rivers for commerce, and the right to have all purprestures therein abated. It was proved, that the defendants had erected houses on the banks of the Avon, so as to strengthen the river, and to incommode the passage to and from the shipping to the shore: that these houses also intercepted the commerce to the town, and tended to defraud the revenue. The encroachments were ordered to be abated, on the ground of the damage to the city: *but were never destroyed, [*608] some composition having probably been entered into. A similar case is there cited to have been determined between the town of Newcastle and Johnson, relative to the right of towage on the river Tyne.

In *Churchman* v. *Tunstal*, Hard. 162, the plaintiff sued by bill, as tenant of an ancient ferry under the Crown, to suppress a new ferry set up in the neighbourhood, to the damage of his ancient ferry, and to obtain an injunction against renewing it. The Court there dismissed the bill, as seeking to establish a monopoly; but another bill being afterwards filed for the same matter, the Court, on 7th April, 14 Ch. II. (Lord Hale presiding in it), decreed, that the new ferry should be suppressed, and that the defendants should not have liberty to use any ferry-boat, to the annoyance of the plaintiff's ancient ferry.†

† See the Minute Book, 1662, p. 181.

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So in the anonymous case, 3 Atk. 750, where it was moved to issue an injunction against building a small-pox hospital in Cold Bath Fields, Lord HARDWICKE lays it down, that, in the case of a public nuisance, an information by the *Attorney-General* is the proper remedy. He was then sitting in equity, and must be understood to mean an information in a court of equity. Besides, he refused the injunction in that case, upon the want of merits, not from any doubt of his jurisdiction. So *Coulson* v. *White*, 3 Atk. 21, establishes the authority of equity to abate nuisances. [*609] *Ryder* v. *Bentham*, *1 Ves. 543; *Sir Lister Holt's* case, 2 Ves. 193.

The grant is bad on another ground. The King, in his *jus publicum*, had possession of the soil covered with the sea, by the passage of his subjects in ships over it. But there was no possession of the soil under the *jus privatum;* and the right to enjoy it being then only a possibility, when it should be recovered from the sea, could not be granted to a subject. The *Attorney-General* v. *Sir Ed. Fermer*, 2 Lev. 171, Sir T. Raym. 241. Much less could one subject transfer this right to another; for, between them, there is not even a colour of possession. It is within the rule against buying pretended titles.

The grant can at most give only a right of entry; but if I convey an estate, and die before entry by the purchaser, the right of entry is gone. So here, the right of entry could only be during the life of King Charles I.

The nature of the grant shews, that it was to be reduced into possession within a reasonable time, if at all. The grant proceeds on a surmise of the public benefit to accrue from embanking the mud-lands. The tithes were not to be demandable for seven years after the embankment. The rent from 1630 was to be increased. Then the embanking within a reasonable time, was considered as a condition annexed to the grant, and has not been complied with during 150 years. The non-payment of the rent during that period proves, that there was no possession, actual or constructive.

[610] But even if this passed by the grant, the grantee has since thrown it open for the public use, by allowing it to continue an open passage for ships during so long a period. The King has

acquired a new right to it, by the possession of his subjects in passing and repassing over it for 150 years. A place thrown open to the public, as a highway, cannot, after long enjoyment, be shut up.

The possession of another part, under the letters patent, during sixty years, cannot inure to give possession of the whole; nor can entry upon any part, under the grant, be considered as entry upon this land which remained overflowed. If there is a conveyance of Blackacre and Whiteacre, entry upon Blackacre, in the name of both, is good. But this supposes that the entry upon Whiteacre was also possible. But if Whiteacre was then held by a disseisor, so as that the feoffee could not enter, the entry upon Blackacre does not inure to both. Here the entry upon this parcel of land was impossible, till recovered from the sea. Besides, the King, by the passage of his subjects, has had actual possession of it, so that the entry upon the other parts of the grant cannot be extended to this.

The defendants, in order to avail themselves of the letters-patent, must either deduce to themselves a regular title against the Crown, or must shew, that the subject was one severed from the Crown, and that they are in possession, which presumes all the mesne conveyances. The defendants do neither. The deduction of title, under the letters patent, to the persons under whom the defendants immediately *claim, is not shewn. It is [*611] clear these persons never had any possession of this spot. Then there is no privity, either by title or by possession, between them and the grantees, and the defendants may be wholly strangers to the letters patent.

Even if they claim under the letters patent, yet these erections must be abated; for it is clear that the King cannot permit a public nuisance, as this is proved to be. De Port. Mar. 85.

Piggott and *Richards*, for the defendant:

It is clear, that as far as the *jus privatum* of the Crown is concerned, a grant of the soil of the sea-coast, or of a harbour, is good. But, if the argument be true, that no possession could ever be taken of the soil while overflown, no grant or feoffment of land covered with water could ever be good.

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But on the contrary, Lord Hale says, (De Port. Mar. p. 85,) that there are a thousand instances of licence from the King to build new wharfs or keys, in which licence the right to the soil, within high and low water-mark, or beyond, is necessarily included.

It is agreed, that a great part of the lands granted have long ago been embanked; but possession of a part is possession of the whole; and we are therefore entitled to hold by length of possession, in corroboration of the grant.

This is a grant of lands to be afterwards recovered from the [*612] sea. It implies, throughout, that *immediate embankment of the whole was not expected; and, as no time is limited, it is still open to us to take advantage of it. Our title is sufficiently made out: for the soil being once granted away from the Crown, mere possession is evidence of the right of the person entitled. To produce the whole conveyances is impossible; for this is a small parcel out of an extensive grant, and we are not entitled to the possession of the deeds under which the whole lands granted are held. It appears, that the land immediately adjoining has been embanked for more than sixty years, and floats of wood used to be moored over the place in question, long before the erections now complained of. This was a possession; for it prevented the free passage over that part of the harbour. Then the mode of trying the right to the land, when the possession was in the subject, is by suit at law. As to this point, it is in the nature of a mere ejectment bill.

Besides, the information does not pray that the soil may be declared to belong to the King, which would be the proper prayer, if the right to the soil were in question. It merely prays, that the erections may be abated, which is the proper prayer on a complaint of nuisance, if at all; and as a nuisance is charged in the bill, the only matter in issue must be that which relates to and supports the prayer of the bill. But as to the question of nuisance, the title to the lands is perfectly immaterial, and therefore our possession, not being properly put in issue, remains unimpeached.

[613] As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach

of the general police of the kingdom, and as such is considered as a crime, and to be prosecuted in the criminal courts. But a court of equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suit in equity, to remedy any other public mischiefs—as to prohibit rope-dancing, plays, &c. or to abate a nuisance or purpresture on the highway. That is exactly like the present case, and is every day prosecuted in the ordinary criminal courts. Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete.

It is true, that in the precedents cited, such informations have been allowed in the case of purprestures; but these were in the time of Ch. I. when the right to trial by jury was not so firmly established as it now is. Besides those were, in part at least, suits as to a civil right, and therefore gave a colour to the jurisdiction. Lord Hale expressly declares (p. 85), that the question of nuisance is a question of fact, and not of law: that is, that it ought to be decided by a jury, not by the Court. In the cases relied upon on the other side, the Court directed a commission to enquire into the fact. The mode now adopted in courts of equity is to direct an issue in such case, instead of granting a commission; and those authorities, therefore, entitle us to expect, that the Court will not decide against us, without an issue.

MACDONALD, Chief Baron, this day delivered the opinion of the Court (after stating the case), to this effect: [614]

It is clear that the right to the soil, between high and low water mark, is *primâ facie* in the Crown. Then the *onus* of proving an adverse title is thrown upon the defendants.

This they attempt to do, under the letters patent: but upon the whole evidence, as far as we can now trace the meaning of the grant, this spot does not seem to have been included in it. The return of the inquisition finds that the embanking the lands granted would be of no detriment to any person. But that is not consistent with the evidence here, that the embanking this land would hurt the harbour, and prevent the passage of boats up to the town of Gosport; then the inquisition and grant must have related to other lands; and the grant, in describing the

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parcels, gives the mudlands on each side of Gosport, studiously passing by the town; so that it does not appear that this land was ever meant to be granted from the Crown.

But the grant appears also to have been made for the sake of the public interest, in having this land brought into cultivation. The exemption from tithes for seven years shews the intent to have been, that it should be put into a state capable of producing titheable matter. The rent also proves the embankment, and regaining from the sea, to have been the condition and spirit of the grant. That has not been complied with.

[615] But the defendants do not deduce their title from the grantees: they shew a title under A. and B., who they aver, were entitled under the grant; but the *onus* of establishing their claim being upon them, they must show how A. and B. derived that right. At present it appears to be the conveyance by mere strangers. The lease and release from them recites the releasors to be entitled under the grant; but this is no evidence of the fact.

They next went on the evidence of possession. But it appears that instead of their having possession, the Crown has, by its subjects, had possession of the place in question; and its being open as a public passage from 1629, precludes any right now to question the title of the Crown. If the grantees ever had any title, it has been abandoned. It would be extremely inconvenient if old dormant grants of the Crown could be enforced in this manner, when the evidence of their nature and extent is lost by lapse of time. Upon the whole, we are of opinion, that the defendants have not made out any title to the soil of the place in question.

But it is argued, that the prayer of the bill being to abate the erections as a nuisance, the Court can only consider that question, as alone supporting the relief prayed; and it is contended, that this Court cannot give such a decree, or at least not without the intervention of a jury, the question of nuisance being, as laid down by Lord Hale, a question of fact, and not of law. That may be, where the question is of nuisance only, and the evidence doubtful. But the cases cited, and those which [*616] *Lord Hale has given us in the treatise "De Portibus Maris," clearly prove, that where the King claims and proves a right to

the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it. The case of the River Thames, and the Bristol and the Newcastle cases, cited by Lord Hale, are all authorities for this proposition. The case in Hardr. 162, was at first determined otherwise; but the reporter doubts its authority, as it was afterwards overturned. It is objected that these cases were in the time of Ch. I.; but it must be remembered, that Lord Hale determined some of them, and approved the rest. Supported by such authority, we do not hesitate to declare, that the soil is the property of the Crown; and of course, to decree, that these buildings be abated.

K. B. (AT NISI PRIUS) Sittings after EASTER TERM.

1790.
May 26.
[4]

CRISTIE *v.* COWELL.

(1 Peake, 4—5.)†

Words actionable in themselves as containing a charge of felony, if spoken in reference to a trespass or breach of contract, are not so.

This was an action for words. The words proved were, "He is a thief, for he has stolen my beer."

It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same, which he had not duly accounted for.

Lord Kenyon directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant [*5] that the plaintiff had actually stolen beer; for if they *referred to the money not accounted for, that being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus if a man says to another "You are a thief, for you stole my tree," it is not actionable,‡ for it shews he had a trespass and not a felony in his contemplation.

The Jury found for the defendant.

† The references to Peake are to the pages in the third edition.

‡ Cro. Jac. 114; Bull. Nisi Prius, p. 5, and 4 Rep. 13, 14; Cro. J. 66; Sir T. Raym. 33

ROE *dem.* HENDERSON *v.* CHARNOCK.

(1 Peake, 6—7.)

1790. *May* 26.

[6]

Whether a year's notice to quit is necessary, when it has been the custom to give that notice. Qu.

EJECTMENT for common field lands, by landlord against tenant.

The defendant attempted to shew that it was the custom of the country to give a year's notice to quit, whereas only half a year's notice had been given in the present instance.

Lord KENYON:

I remember there was a cause some time ago where Lord MANSFIELD said that three months notice is sufficient under a special custom: after so great an authority it is too much for me, sitting at *Nisi Prius*, to say that under a *special custom twelve [*7] months' notice is not necessary. But there ought to be very strong evidence, and the witness must not speak to opinion, but facts.

The defendant failing in his proof the lessor of plaintiff had a verdict.†

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

MIDDLETON *v.* BREWER.

(1 Peake, 20—23.)

1790. *Dec.* 3.

At Westminster.

[20]

A promise to pay the debt of another need not be proved to be in writing when the defendant pleads a tender to the count on such promise.

ASSUMPSIT. The declaration stated, that the defendant's son being indebted to the plaintiff in a large sum of money, in consideration of the plaintiff's forbearing to sue him for the same, defendant promised to pay.

† *Vide* Mr. Justice WILMOT's argument, 3 Burr. 1609; and *Roe* dem. *Brown* v. *Wilkinson*, Butl. Co. Lit. 270 b, note 1.

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The defendant pleaded the general issue to part, and a tender of the residue. The question was, whether the plaintiff was obliged to prove an undertaking in writing.

Lord KENYON was clearly of opinion that he was not. By paying the money into Court on the plea of tender the defendant had admitted the promise; this was not as if there had been several counts, and the defendant had pleaded the tender and [*21] paid the money into Court on some *counts only; he had applied this tender to this count, and therefore the plaintiff was not obliged to prove the promise.†

† See 1 Williams, Saund. 33, c, and cases there collected. So where in an action for the rent of tithes the plaintiff averred that he had agreed to let the tithes to the defendant, and in pursuance of that agreement had permitted him to take them, and the defendant pleaded a tender on all the counts generally; the Court of C. P. held, that he was thereby precluded from shewing a legal interruption to his taking the tithes, *Cox* v. *Brain*, 3 Taunt. 95. So payment of money into Court is an admission of the contract stated in the declaration. Therefore in an action on a bill of exchange, where the defendant paid money into [*22] Court on the whole declaration, the Court held that by so doing he had admitted the bill, *Gutteridge* v. *Smith*, 2 H. Black. 374. Nor can the defendant after such payment object to the insufficiency of the stamp, *Israel*, v. *Benjamin*, 3 Campb. 40, K. B. M. T. 1808. So in an action of covenant, such payment renders it unnecessary to prove the deed, *Randall* v. *Lynch*, 2 Camp. 357; *Watkins* v. *Towers*, 2 T. R. 275. And such payment is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. Therefore, where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part, and kept the residue in specie, paid money into Court generally upon a declaration containing a count for goods sold and delivered, it was held, that he had thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered, *Burnett* v. *Francis*, 4 Esp. 28; 2 Bos. & Pul. 550. *Vide Burrough* v. *Skein*, 5 Burr. 2640. So where plaintiff declared for work and labour, as a surgeon, payment of money into Court admits his right to sue as such, *Lipscombe* v. *Holmes*, 2 Camp. 440, and when paid into *a superior court is a conclusive admission of plaintiff's right to sue in such court, *Miller* v. *Williams*, 5 Esp. 19; but does not preclude the defendant from availing himself of his infancy, *Hitchcock* v. *Tyson*, 2 Esp. 482 n. Payment of money upon some of the counts is an admission of the cause of action on those counts only, *Baillie* v. *Cuzalet*, 4 T. R. 579; and of a legal demand only, *Ribbans* v. *Crickett*, 2 B. & P. 269; so that in an action for two demands, the plaintiff cannot apply such payment to the illegal, and recover for the legal demand, *ibid.* Payment of money is only an admission of the contract, and does not

It appearing that more than sufficient to satisfy all just demands of the plaintiff had been tendered, the Jury found a

Verdict for the defendant.

1790.
MIDDLETON v. BREWER.

THWAITES *v.* RICHARDSON.

(1 Peake, 23—24.)

1790. *Dec.* 3.
At Westminster.
[23]

In an action for *Assumpsit* against one partner, evidence may be given of the admission of another. *Comme semble.*

THIS was an action for money paid, laid out, and expended, &c. The defendant was one of the proprietors of a public newspaper called the *Morning Star.* The plaintiff had expended several

preclude the defendant from disputing his liability ultra such payment, by objecting in an action on a policy of insurance either that the name of the party interested is not inserted in the policy, *Cox* v. *Parry*, 1 T. R. 464; or that the goods were not loaded according to the terms of the policy, *Mellish* v. *Allnutt*, 2 M. & S. 106. But he cannot shew that the policy was originally different, and was altered by the broker without his knowledge, *Andrews* v. *Palsgrave*, 9 East, 325. So in an action on a valued policy such payment upon a count, stating a total loss by capture, is no admission of a total loss; but the plaintiff is bound to prove that he suffered damage from the capture beyond the amount of the sum paid into Court, *Rucker* v. *Palsgrave*, 1 Camp. 557, 1 Taunt. 419. So in an action for goods sold and delivered, the plaintiff must prove that the goods ultra the payment were his property, although before the money was paid into Court a particular was delivered to defendant, stating that the action was brought for a lot of goods sold for the plaintiff to defendant by plaintiff's broker, *Blackburn* v. *Scholes*, 2 Camp. 341. And where in an action against a carrier for not safely carrying goods, he paid 5*l.* into Court, it was determined that by so doing he had admitted the contract for the safe carriage and the loss, but that he was still at liberty to shew that he was not liable beyond the sum paid into Court, by proving a notice, "That no more than 5*l.* would be accounted for, for any goods or parcels, unless entered as such and paid for accordingly," *Clark* v. *Gray*, 6 East, 564. In a former case it had been determined, that by the payment of money into Court the defendant had admitted the contract to the extent of being liable for the whole loss, and could not avail himself of a notice conceived in terms nearly similar. *Vide* *Yate v. *Willan*, 2 East, 128. Where the plaintiff, previous to the trial, has induced the defendant to believe that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose, the Court will not allow the plaintiff to object to the receipt of that evidence on the ground of the contract being admitted by the payment of money into Court, *Mullen* v. *Hartshorne*, 3 Bos. & P. 556.

[*23]

1790.

THWAITES v. RICHARDSON.

sums of money in paying the workmen employed in printing the paper, &c.

After proving the defendant a partner in the paper, the plaintiff offered to give evidence of the admission of another partner that the money was owing to the plaintiff.

On this evidence being objected to, Lord KENYON said he thought that though in cases where an action is brought against several partners, the admission of any one might be given in evidence to prove all liable, yet when one only was sued, the admission of the other could not be given in evidence to charge him.

[*24] It was then proposed to release the other partner *and call him, but the plaintiff's counsel recollecting that by so doing they would discharge both, did not call him; and upon *Garrow*, for the plaintiff, observing that there was a case† in one of the books, where it had been held that the admission of one joint maker of a promissory note might be given in evidence to take it out of the Statute of Limitations in an action brought against the other alone,

Lord KENYON said, he would receive the evidence with liberty for the defendant to move the Court upon the question as to its admissibility.‡

The parties afterwards agreed to a reference.

† *Whitcomb* v. *Whiting*, Dougl. 652.

‡ A similar admission was received in evidence by Lord ELLENBOROUGH in *Nicholls* v. *Dowding*, 1 Stark. 81. And in *Wood* v. *Braddick*, 1 Taunt. 104, the Court of C. P. held that an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts that took place during the partnership, was competent evidence to charge the other partner. So in an action against one of several members of a co-partnership society, the entries in a book, containing a record of the proceedings of the society, produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the defendant after he has been proved to be a member of the society, *Alderson* v. *Clay*, 1 Stark. 405, Lord Ellenborough, C. J. But where A. and B. were partners, and also part owners of a vessel, Lord ELLENBOROUGH held, that an admission by A. concerning the part ownership merely was not admissible against B., *Jaggers* v. *Binnings*, 1 Stark. 64.

GANER *v.* LADY LANESBOROUGH.

(1 Peake, 25—26.)

1790. *Dec.* 6.

On a replication that A. was not married to B. proof that A. was married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the issue.

The English Courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country.

A Jewess may be permitted to give parol evidence of her own divorce in a foreign country according to the custom of the Jews there.

DEBT on judgment.

The defendant pleaded in abatement that she was covert of John King, and the plaintiff, by his replication, traversed that plea. The defendant proved her marriage to King; in answer to which the plaintiff proved the marriage of King with a former wife, and that she was still living. This evidence was objected to as incompetent for the plaintiff to give on this replication, which only traversed the marriage of King with the defendant. But Lord KENYON admitted it, saying, it proved that there was no marriage at all between the defendant and King, he being unable to contract marriage with her.

The defendant then offered to prove that King being a Jew and his former wife a Jewess, they were divorced at Leghorn, according to the rites and customs of the Jews there, and that after such divorce it was competent to either party to marry again.

To prove this she produced an instrument under the seal of the Synagogue there, whereby they were divorced from each other. But Lord KENYON held this to be no evidence, for before he could take notice of any proceeding in a foreign Court, he must know the law of the country, which was matter of evidence, and should be proved by witnesses.

The defendant then called King's former wife to prove the divorce. She was objected to as an incompetent witness, but the objection being overruled, she swore (without producing any instrument), that she was divorced from King before the Rabbi, at Leghorn, according to the ceremony and custom of the Jews there.

On this evidence the *Defendant had a verdict.*

1790.
Dec. 13.
At Guildhall.
[33]

MEE *v.* REID.

(1 Peake, 33.)

A member of the kirk of Scotland may be sworn without kissing the book.

ASSUMPSIT on a bill of exchange.

The plaintiff's case being proved, the defendant called a witness, who was a Scotchman and a member of the kirk; he refused to kiss the book, and insisted on holding up his hand.

An objection was made to this mode of administering the oath, and Lord KENYON was at first inclined not to permit him to be sworn in this form, but at length determined to receive his evidence under the sanction of an oath so administered.

Accordingly he held up his right hand and repeated the oath after the crier.*

K. B. (AT NISI PRIUS) SITTINGS AFTER HILARY TERM.

1791.
Feb. 23.
At Westminster.
[50]

BISSET *v.* CALDWELL.

(1 Peake, 50—51.)

Wearing apparel may be distrained for rent.

TRESPASS for breaking and entering the plaintiff's house, expelling him therefrom, seizing his goods, &c. The defendant pleaded the general issue.

The defence was that the plaintiff had taken lodgings, ready furnished, of the defendant, at the rent of four guineas per week; and rent being in arrear the defendant distrained the plaintiff's wearing apparel, which were in the lodgings. The plaintiff's counsel insisted that these could not be taken as a distress.†

* *Vide* Leach's Crown Cases, 348, *Mildrone's* case; Peake's Law Ev. [141] 148.

† *Vide* 2 Inst. 132.

LORD KENYON:

1791.

BISSET v. CALDWELL.

This has long been a *vexata quæstio*, but I think they would now be held to be *the subject of a distress. The same reason does not now exist, as formerly, when *averia carucæ*, &c. could not be taken by the common law, because the things distrained being then taken only as a pledge, it was considered that the person losing those things was rendered incapable of earning money to pay the debt, and unserviceable to the commonwealth.† [*51]

It being proved that the defendant had expelled the plaintiff by force from his possession of the rooms, he had a verdict and 1*s*. damages, but Lord KENYON said it was so shameful an action that he would certify under the 43rd Eliz.

HODGES, ESQ., *v.* WINDHAM, ESQ.

(1 Peake, 53—54.)

1791. *Feb.* 23. *At Westminster.*

In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action, and not merely to mitigate the damages. [53]

TRESPASS for criminal conversation with the plaintiff's wife.

The plaintiff and his wife parted on the 8th of August, 1789, and articles of separation were then executed by them. After which the criminal connexion, which was the subject of this action, took place.

Bearcroft, for the defendant, objected that the action could not be supported.

Lord KENYON said it was a question that he had *entertained considerable doubts upon, but that he was inclined to suffer the [*54]

† S. C. 1 Esp. 206, n.; *Baynes* v. *Smith*, 1 Esp. 206, S. C. In *Hutchins* v. *Chambers* and others, 1 Burr. 579, it was held that *averia carucæ* might be distrained for non-payment of a poor rate, and Lord MANSFIELD gave the same reason as that above given by Lord KENYON. See also 3 Salk. 136. So in *Simpson* v. *Harlopp*, Willes, 512, and *Gorton* v. *Falkner*, 4 T. R. 565 (2 R. R. 463), it was held that implements of trade might be distrained for rent if they were not in actual use at the time, and if there were no other sufficient distress on the premises.

1791.
HODGES
v.
WINDHAM

cause to proceed, and take a note of the objection, that it might be brought before the Court.

The defendant proving that the plaintiff had, before his separation from his wife, voluntarily permitted other men to have criminal connexions with her, Lord KENYON said it was not to be endured that a man should suffer and encourage his wife to live in a state of prostitution, and then come into a court of justice to ask damages. His having suffered such connexion with other men was equally a bar to the action as if he had permitted the present defendant to be connected with her, for such a husband could have none of that social affection for his wife, the loss of which is the ground of this action.

Verdict for the defendant.

1791.
March 1.
At Guildhall.
[60]

GORHAM AND ANOTHER *v.* THOMPSON AND ANOTHER.

(1 Peake, 60.)

When partners dissolve their partnership it is incumbent on them to publish the dissolution in the Gazette, or they will be all liable to an action at suit of a creditor who did not know of the dissolution, and delivered goods to one thinking he was dealing with all.

ASSUMPSIT. One of the defendants had suffered judgment by default.

The defendants had been partners about seven years since, and had dissolved that partnership, but no notice of the dissolution had been inserted in the Gazette, nor did the plaintiff know of it, but thought they were dealing with both defendants. But it appeared that the dissolution was generally known in the neighbourhood.

Lord KENYON said, to discharge the partner retiring from the partnership there must be a public advertisement in the Gazette, or at least the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. It would be the hardest measure imaginable upon the creditor were the law otherwise, for while he supposed he was giving credit to a

man having sufficient to satisfy the whole of his demand, he might be trusting a beggar.

Verdict for the plaintiff.†

1791.
GORHAM v. THOMPSON.

STUBBING *v.* HEINTZ.

(1 Peake, 66—67.)

1791. *Mar.* 3.

At Guildhall. [66]

If when a master gave his servant money to buy meat for the use of the family, the servant, instead of paying ready money order the meat on credit and embezzle the money, the master is not liable.

ASSUMPSIT for goods sold and delivered.

At Midsummer 1784, the defendant contracted with the plaintiff to serve him with all kinds of meat at 5½*d.* per lb. for ready money. The cook maid was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a Monday morning; and the defendant always gave the servant money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook maid, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear 33*l.* 3*s.* 3*d.* She then ran away from the defendant's house, after which the defendant was called upon, for the first time, to pay this sum of money, and on his refusal the plaintiff brought the present action. The defendant also proved that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the defendant.

Lord KENYON said nothing could be clearer than *that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant [*67]

† *Vide Graham* and others v. *Hope* and others, 1 Peake 208 (p. 671 *post*) and compare *McIver* v. *Humble*, 16 East, 169. [Partnership Act, 1890, s. 36 (2).—F. P.]

1791.
STUBBING v. HEINTZ.

to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the plaintiff when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant, and not to the defendant. The defendant had not entered into any new contract, but still thought that he was dealing on the same terms as before.

*Verdict for the defendant.**

K. B. (AT NISI PRIUS) SITTINGS AFTER EASTER TERM.

FORES *v.* WILSON.

(1 Peake, 77—78.)

1791.
June 10.
At Westminster.
[77]

A master may maintain an action for debauching his servant, though he is no ways related to her in blood.

In an action for debauching a servant *per quod*, &c. it is not necessary to prove that she was employed as a menial servant.

THIS was an action for assaulting the maid servant of the plaintiff, and debauching her *per quod servitium amisit.*

The servant was no relation to the plaintiff, but merely a servant. The plaintiff proved by his first witness that the defendant enticed the girl to leave the plaintiff's service, and kept her to

[67]

* If the master never had any previous dealings with a tradesman, but a tradesman's dealings have all been with the servant whom the master has regularly paid, in that case the master shall not be charged. As where the action was for oats and hay furnished for the defendant's horses, and plaintiff having no dealings with the master but with the coachman, to whom the master gave money for the purpose monthly, the plaintiff never applied to the defendand (the master) during the time, and the demand was for years standing: it was ruled that the master was not liable. Per Lord KENYON in *Kendal* v. *Andrews*, Sitt. E. T. 28 G. III. Esp. N. P. 115. *Vide Precious* v. *Abel*, 1 Esp. Rep. 351. *Semb. contr.* Where A. having purchased goods of B. on credit, gives notice to B.'s servant that in future he shall always pay for the goods as he receives them, and accordingly pays the servant, who embezzles the money, A. is not discharged unless he shews that the notice reached B. Per ELDON, C. J., 3 Esp. 85; and *vide Hazard* v. *Treadwell*, 1 Str. 506; *Sir R. Wayland's* case, 3 Salk. 234; *Boulton* v. *Hillersden*, *ibid.*, 1 Lord Raym. 224 S. C. and cases there cited.

1791.

FORES v. WILSON.

live with him for some time: he then called a witness to prove that he had debauched her.

Erskine, for the defendant, objected to this evidence, contending, that this action being brought by a person who was no relation to the person seduced, the Jury could not take the injury which she had sustained into their consideration.

LORD KENYON:

This is an action in which damages may be given to recompense the servant for the injury she has received. Undoubtedly there must subsist some relation of master and servant, but this action materially differs from the common action for seducing a hired servant to leave her master's service. In that kind of action the plaintiff must prove that the defendant knew the servant was in his service, but no such knowledge is necessary to support this action. And though a degree of the relation of master and servant must subsist, yet a very slight relation is sufficient; as it has been determined, that when daughters of the highest and most opulent families have been *seduced, the parent may [*78] maintain an action, on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Verdict for the plaintiff.

WARWICKE *v.* NOAKES.

(1 Peake, 98.)

1791. *June* 21.

At Guildhall. [98]

If a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss.†

ASSUMPSIT for goods sold and delivered, and money had and received.

The plaintiff was a hop merchant, and the defendant his customer, living at Sherborne in Dorsetshire. The plaintiff sold

† This decision is in accordance with the modern authorities by which it is decided that the posting of a letter in the ordinary course of business, accepting an offer contained in a letter, is an act conclusively effecting a binding contract. *Dunlop* v. *Higgins* (1848), 1 H. & C. 381; *Household Fire &c. Co.* v. *Grant* (1879), 4 Exch. D. 216; 48 L. J. Exch. 577.—R. C.

1791.
WARWICKE v. NOAKES.

him hops, and also sold hops to several other persons in that neighbourhood; and requested the defendant (as his friend) to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn.

LORD KENYON:

Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since: and as the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff.

The plaintiff was nonsuited.

1791.
July 15.
At Guildhall.
[102]

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

HARRIS *v.* WATSON.

(1 Peake, 102—103.)

No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship.

IN this case the declaration stated, that the plaintiff being a seaman on board the ship *Alexander*, of which the defendant was master and commander, and which was bound on a voyage to Lisbon: whilst the ship was on her voyage, the defendant, in consideration that the plaintiff would perform some extra work, in navigating the ship, promised to pay him five guineas over and above his common wages. There were other counts for work and labour, &c.

The plaintiff proved that the ship being in danger, the defendant, to induce the seamen to exert themselves, made the promise stated in the first count.

*LORD KENYON:

1791.
HARRIS v. WATSON.
[*103]

If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost.† This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.

The plaintiff was nonsuited.‡

DU BARRE *v.* LIVETTE.

(1 Peake, 108—111.)

1791.
July 27.
At Guildhall.
[108]

An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed is at an end.

THIS was an action of trover for jewels, &c. which had been stolen from the plaintiff's house in France.

The defendant was one of the robbers, and had been indicted at the Old Bailey for the theft, but it appearing that the robbery was committed in a foreign country, he was acquitted. [109]

Previous to the trial at the Old Bailey he had several conversations with his attorney (Crossley), but the defendant being a Frenchman, and Crossley not understanding that language, it was found necessary to have an interpreter, which office was performed by a man of the name of Rimond.

Rimond was now called as a witness, to prove that the defendant at those meetings admitted that he had stolen the

† *Harman* v. *Bawden*, 3 Bur. 1844; *Abernethy* v. *Landale*, Doug. 520.

‡ This decision was followed by Lord ELLENBOROUGH in a case where the agreement was made on shore in consequence of the desertion of some of the crew and the impossibility of procuring other hands, *Stilk* v. *Myrick* (1809), 1 Camp. 317. But in a case where desertion of the crew left the vessel so shorthanded that it was unreasonable to proceed to sea with the remaining hands, the Court of Queen's Bench inferred that the crew were not bound to proceed under their articles, and that there was good consideration for a new contract, *Hartley* v. *Ponsonby* (1857), 7 E. & B. 872; 26 L. J. Q. B. 322.—R. C.

1791.

DU BARRÉ v. LIVETTE.

diamonds, &c. and had no property in them. Immediately the witness discovered the wickedness of the transaction, he abandoned the defendant.

The defendant's counsel objected to Rimond being permitted to give this evidence, contending that this was a confidence which ought not to be broken.

Garrow, for the plaintiff, argued that this evidence ought to be admitted. No confidence was reposed in Rimond; he was merely the organ which conveyed the sentiments of the defendant to his attorney, and those of the attorney to the defendant. When he had done this, his duty was over, and he had no further concern with the defendant. A case much stronger than this, he said, had been lately determined by Mr. Justice BULLER on the Northern circuit. That was a case in which the life of the prisoner was at stake. The name of it was *The King* v. *Sparkes*. There the prisoner *being a papist had made a confession before a protestant clergyman, of the crime for which he was indicted, and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. The reason against admitting that evidence was much stronger than in the present case; there the prisoner came to the priest for ghostly comfort, and to ease his conscience oppressed with guilt. Besides, in this case the confidence, if any was reposed, was at an end. The confidence was merely as it respected the trial then coming on, without any reference to this cause, which was not then thought of, and supposing it could not be given in evidence on that trial, still it is admissible on the present, when the purpose for which it is given is at an end.

[*110]

LORD KENYON:

It is sufficient for me, sitting here, to say that this case materially differs from that cited, but I should have paused before I admitted the evidence there admitted. The case, as it respects the Judge who determined it, is intitled to every attention from me: but this case differs from it. The Popish religion is now unknown to the law of this country, nor was it necessary for the prisoner to make that confession to aid him in his defence. But the relation between attorney and client is as

1791.
DU BARRÉ v. LIVETTE.

old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present it is equally necessary that an interpreter should be employed: every thing said before that interpreter was equally in confidence as *if said to the attorney when no interpreter was present; he was the organ through which the prisoner conveyed information to the attorney, and it is immaterial whether the cause for the defence of which the conversation passed is at an end or not, it ought equally to remain locked up in the bosoms of those to whom it was communicated. His Lordship confessed he spoke with some doubt, but as the plaintiff had other witnesses to call, he wished this evidence not to be received, lest a new trial should be granted on account of his having improperly received it.

[*111]

The witness was permitted to reveal such conversation as he had with the defendant in the absence of Crossley.

The plaintiff obtained a verdict.†

WHITE *v.* BOULTON AND OTHERS.

(1 Peake, 113—114.)

1791.
July 28.
At Guildhall.
[113]

The proprietors of a mail coach are answerable for any injury happening to a passenger through the misconduct of their driver.

THIS was an action against the defendants, who were proprietors of the Chester mail coach, for the negligence of the driver, by reason whereof the coach was overturned, and the plaintiff's arm broken. The action was in *assumpsit;* the declaration stated that the defendants were proprietors of the coach, and that in consideration the plaintiff had paid them three guineas for his carriage, they undertook to carry him safely, &c.

The plaintiff having proved his case, *Mingay*, for the defendants, said that he was told a case of *Harris* and *Wilson* had been tried before Lord Loughborough at the Common Pleas

† 2 R. R. 424; *vide Cobben* v. *Kendrick*, and *Wilson* v. *Rastal*, 2 R. R. 515.

1791.

WHITE v. BOULTON.

[*114]

Sittings after Easter Term last, in which his Lordship had held that the proprietors of a mail coach were not answerable for the negligence of their servants; saying that those coaches were not under the government of the proprietors, but the concern of the public, being established merely for the conveyance *of letters; and therefore if any person travelled in them, he went at his own risk, and the law implied no promise for his safety.

Lord KENYON said he was certain that no such determination had ever been made by Lord LOUGHBOROUGH. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century, whether the postmaster-general was liable for letters sent.† He would not deliver any opinion on that point, as it had nothing to do with the present case; for when these coaches carried passengers, the proprietors of them were bound to carry them safely and properly.

The plaintiff had a verdict, and £60 damages

Note.—This appears to be the first reported case upon the responsibility of coach proprietors to a passenger for the driving of the coach. After several cases at *Nisi Prius*, the question as to this responsibility came before the Court of Common Pleas in *Crofts* v. *Waterhouse* (1825) 3 Bing. 319, when BEST, C. J. laid down the law to the effect that the proprietors are responsible for the negligence of the driver, and that the negligence is a question for the jury. As to the responsibility for the sufficiency of the coach, see *Sharp* v. *Grey* (1833) 9 Bing. 457; *Readhead* v. *Midland Ry. Co.* (1867—69) L. R. 2 Q. B. 412, 36 L. J. Q. B. 181, 4 Q. B. 379, 38 L. J. Q. B. 169.—R. C.

† See *Lane* v. *Sir Robert Cotton* and another, 1 Lord Raym. 646, &c. This question was laid at rest by the case of *Whitfield* v. *Lord Le Despencer et al'*, Cowp. 754, where it was determined that no action would lie against any member of the post office unless he had been personally negligent. *Fletcher* v. *Braddick*, 2 Bos. & Pul. N. R. 182.

PHILP *v.* SQUIRE.

(1 Peake, 114—115.)

1791.
July 28.

At Guildhall.

[114]

No action lies for harbouring the plaintiff's wife where she is kept by the defendant from a principle of humanity, to secure her from the ill-treatment of her husband.

THIS was an action on the case for harbouring the plaintiff's wife after notice from the plaintiff not to do so.

*It appeared that the plaintiff's wife came to the house of the defendant (to whose wife she was related) and represented herself to have been very ill used by her husband, who, she said, had turned her out of doors. Upon this representation the defendant received her into his house, and, at her request, suffered her to continue there after he had received notice from the husband not to harbour her. It was not proved that the husband had in fact ill treated his wife. [*115]

LORD KENYON:

The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that for harbouring an apprentice, the ground of the action in that case being the loss of the apprentice's service.

The plaintiff was nonsuited.†

† *Vide Winsmore* v. *Greenbank*, Willes, 577.

1791.
Aug. 1.
At Guildhall.
[116]

ROBERTS AND ANOTHER, ASSIGNEES, &c. *v.* DOXON.

(1 Peake, 116.)

Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the state of the balance, generally, without producing them.

THIS was an action of trover brought by the plaintiffs to recover a quantity of goods which they contended had been delivered to the defendant by the bankrupt Cooke in contemplation of bankruptcy.

The bankrupts were Cooke & Kilner. Cooke was also partner in another house with one Wilkinson, and two commissions had issued, one against Wilkinson & Cooke, the other (under which the plaintiffs were chosen assignees) against Cooke & Kilner.

One of the assignees under the commission against Wilkinson & Cooke was called as a witness, to prove that Wilkinson & Cooke's debts, a little time before their bankruptcy, amounted to a much larger sum of money than their credits. He produced no papers, but said he collected his information from having inspected their accounts.

Lord KENYON thought that though he could not state the particulars of the books without producing them, yet that he might speak to the general amount, not by saying that one page was so much and another so much, but what from his general observation he perceived to be the general state of their accounts.

Verdict for the plaintiff.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

BLACK *v.* SMITH.

(1 Peake, 121—122.)

1791. *Nov.* 30.

At Guildhall.

[121]

If A. be indebted to several persons in different sums of money, and when they are all assembled together, tenders them one gross sum, sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. It is not necessary to produce the money tendered when the creditor insists on more being due.

THIS was an action of *assumpsit* on a special promise to pay the plaintiff (a mariner) more than the ordinary wages in consideration of his undertaking a voyage from Hambro' to Newcastle.

The defendant had pleaded a tender, and paid money into Court sufficient to cover the ordinary wages.

It appearing that this promise was extorted from the defendant by the mutinous conduct of the mariners; this part of the case was given up,† and the only question was, whether a legal tender had been made. The like promise had been made to the other sailors, as to the plaintiff, and several of them had also brought actions against the defendant; but before the commencement of the present action, the plaintiff and several other sailors being in the same room, the defendant offered them as much money as was sufficient to pay all the crew their legal wages, but did not distinguish the particular sum due to each. The *amount of the [*122] whole money offered was about 11*l.* the debt due to the plaintiff 1*l.* 5*s.* All the sailors present refused to receive less than the money promised them, and upon hearing this their resolution, the defendant did not produce the money, which he had ready to pay them.

Garrow, for the plaintiff, objected that this was not a good tender; he said this was like the case of a Bank note of 500*l.* being tendered to pay the debt of 100*l.* and the change being demanded. This would surely not be a good tender.

† *Vide Harris* v. *Watson, ante*, p. 654.

1791.

BLACK v. SMITH.

LORD KENYON:

This is true in part, though not wholly so. I take it to be clear beyond a doubt, that if the debtor tenders a larger sum of money than is due, and asks for change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum. I think that the tender made in this case was a good one; they were told there was enough to pay all, and they objected to receive it, because they wanted more. There is no occasion to produce the money if the creditor refuses to receive it on account of more being due.

Verdict for the defendant.

1791. *Dec.* 2.

[125]

REX *v.* BARTHOLOMEW NEVILLE.

(1 Peake, 125—126.)

A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is much increased by his manufacture.

THIS was an indictment for a nuisance in carrying on the business of a melter of kitchen stuff and other grease. * * *

[126] Upon the whole of the evidence it appeared, that there had been manufactories, which emitted disagreeable and noxious smells, carried on in this neighbourhood for many years; and that the defendant came into the neighbourhood about four years ago. There was contradictory evidence as to the fact of the stench being much increased by the defendant's melting house: some of the witnesses for the Crown stating it to have made the neighbourhood much more uncomfortable; those on behalf of the defendant saying the difference was scarcely perceptible.

Lord KENYON left it to the jury to consider whether the noxious vapour was much increased by this addition of the defendant. Where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time; but if

another man comes, and, by his manufacture, renders that which was a little unpleasant before, very disagreeable and uncomfortable, though it would not amount to a nuisance by itself, still he is answerable for it.

The defendant was acquitted.†

FELL *v.* BROWN, Esq.

(1 Peake, 131—132.)

1791.
Dec. 5.

No action lies against a barrister for misconduct.

[131]

This was an action against the defendant, a barrister, for unskilfully and negligently settling and signing a bill filed by the plaintiff in the Court of Chancery, which bill was referred by the Lord Chancellor to the Master, for scandal and impertinence, and the plaintiff obliged to pay the costs of that reference.

Erskine, for the plaintiff, in his address to the Jury said, that he should prove this to be *crassa negligentia*, and not a mere error in judgment. If a counsel gives his opinion on any question, and happens to be mistaken, it cannot be said that he has been guilty of gross negligence; but if he is so inattentive to his duty as to blunder in the common course of business, he makes himself liable to an action, as would also a physician for such gross misconduct.

Lord Kenyon was clearly of opinion, that this action could not be supported. More objections than one, his Lordship said, might be made to it. The Court of Chancery will in such cases exert a summary power, if it is found expedient so to do;‡ but if that Court will order the counsel to pay the costs, it does not follow that an action can be maintained. If this action could be supported, it would equally lie against a counsel for *inserting a count in a declaration, or putting matter in a plea which ought [*132]

† A leading case on this subject is now *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642, 653, 35 L. J. Q. B. 66. See also *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852, 865, 48 L. J. Ch. 785.—R. C.

‡ Rules and Orders of Chancery, 93; Mitford's Pleadings, 47.

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FELL
v.
BROWN.

not to be there, and which the Court should think improper and impertinent. In a case† where Lord Weymouth was a defendant, the Court thought the declaration full of unnecessary matter, and ordered it to be struck out, with costs, but no one ever entertained an idea that an action could be maintained against the counsel who drew that declaration. His Lordship added, that he believed this action was the first, and hoped it would be the last, of the kind

On this opinion, the cause was given up, and the plaintiff nonsuited without one witness being examined; but his Lordship told the plaintiff's counsel he would take a note of the cause, that they might move for a new trial, if they thought proper.‡

1791.
Dec. 6.
[132]

DUBERLY *v.* GUNNING.

(1 Peake, 132—133.)

The Court will put off the trial on the affidavit of the defendant's attorney that a material witness is kept out of the way by the plaintiff.

THIS was an action for criminal conversation with the plaintiff's wife.

[*133] The cause stood in the paper for trial this day, *and a motion was made by *Bearcroft* for the defendant to put off the trial on an affidavit, stating a suspicion that two of the defendant's witnesses were kept out of the way by the plaintiff. The affidavit was made by the defendant's attorney, who swore that he believed the witnesses were material and necessary for the defendant's defence.

Erskine, for the plaintiff said, that had the question between the parties been a matter of title, which might be purely a question of law, the affidavit of the attorney would have been sufficient; but that in a case like the present, which must be entirely a question of fact, the defendant himself should swear to the materiality of the witnesses.

† Cowp. 665; *ibid.* 737.
‡ *Vide Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890.

LORD KENYON:

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DUBERLY v. GUNNING.

I think this affidavit is sufficient. There was once a case† where on a question of identity, on an attainder of high treason, the Court, before they would put off the trial, required the defendant to swear that he was not the same person. How far that case was relished at the time the public opinion of it since has shown. It has never since been considered as a precedent, or at all acted under.

The trial was put off.‡

PEPPER *v.* BURLAND.

(1 Peake, 139—140.)

1791. *Dec.* 13.

[139]

Where a builder agrees to erect any building for a particular sum of money, and additions are made, the builder is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the excess only.

ASSUMPSIT for work and labour as a carpenter.

The defendant proved that the plaintiff contracted to do all the carpenter's work necessary to be done in a house which the defendant was building, for a certain sum. It was admitted that the roof of the house had been done in a manner different from that specified in the contract, and the defendant had paid money into Court sufficient to cover the excess.

A plan was produced, and proved by the plaintiff, wherein the dimensions of the house were stated to be 15 feet; but the house on which the work was done was 17 feet. It did not appear that the plaintiff had ever seen this plan before he *began to work; but [*140] the house was begun by the bricklayer on the scale of 17 feet, before any contract was made with the plaintiff.

LORD KENYON:

I have often declared, and have had the good fortune to have my opinion adopted by Juries, that where some additions are

† *Mr. Charles Radcliffe's* case, Fost. Rep. 40; 1 Black. Rep. 3.

‡ In *Sullivan* v. *Magill*, 1 H. Black. 637, the Court said they would not put off the trial on the affidavit of the attorney's clerk, unless it appeared that he had the management of the cause.

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PEPPER v. BURLAND.

made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist, as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the plaintiff has failed in shewing the plan by which he contracted to work to be the same as that produced. I admit that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and say to what part of it the work shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no contract at all had ever been made; but in the present case the contract is not proved to have been wholly abandoned, for it appears that the dimensions were the same when the plaintiff contracted as they were when the building was finished; the only excess was in the alteration of the roof, and money enough to cover that has been paid by the defendant into Court.

Verdict for the defendant.

K. B. (AT NISI PRIUS) SITTINGS AFTER HILARY TERM.

1792.
March 1.
[155]

CAILIFF AND ANOTHER *v.* DANVERS.

(1 Peake, 155.)

A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge.

ASSUMPSIT against the defendant as a warehouseman, for negligently keeping a quantity of ginseng, which had been deposited by the plaintiffs in his warehouse; whereby it had been destroyed and spoiled.

It appeared that the box containing the ginseng had been opened, by the plaintiffs' directions, for the purpose of shewing it to persons who were about to purchase it. That several persons looked at it on different days, and every night the lid of the box was shut down, but not nailed. That many cats were

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CAILIFF
v.
DANVERS.

kept in the warehouse, and all possible care taken to destroy vermin, notwithstanding which the rats had got at the ginseng, and destroyed it.

Lord KENYON said, that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse. That he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by the act of God or the King's enemies; and that the defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent.

The plaintiff was nonsuited.

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

MARCH *v.* WARD.

(1 Peake, 177—178.)

1792.
June 30.
At Westminster.
[177]

A promissory note signed by two persons, and beginning "I promise," &c., is joint and several.

ASSUMPSIT on a promissory note made by the defendant and one Bowling, in the following words; viz.

"I promise to pay three months after date, to Wm. March, 8*l.* 5*s.* for value received in fixtures.

"ROBERT BOWLING.
"THOMAS WARD."

It was objected that this promissory note was joint only, and not several.

LORD KENYON:

I think that this note, beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton

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MARCH
v.
WARD.
[178]

at Chester, exactly similar to the present, wherein I was counsel for the defendant; I persuaded the Judge that it was a joint note only, and the plaintiff was nonsuited, but on an *application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter "I" applies to each severally.

Verdict for the plaintiff.

1792.
June 30.
At Westminster.
[178]

HARTLEY *v.* PEHALL.

(1 Peake, 178—179.)

A man is not obliged to accept a conveyance when the title is doubtful.

THIS was an action of *assumpsit* on an agreement to take a public house.

At the time the parties were treating about the house, the defendant's appraiser was proceeding to examine the lease, when the plaintiff stopped him, and said he need not trouble himself as the lease contained nothing but the usual and ordinary covenants, and the house was a free house. In consequence of this, the appraiser desisted from further examining the lease, and the defendant entered into the agreement on which the action was brought.

The plaintiff was not the original lessee, but the persons who had assigned the lease to him were brewers, and had procured a covenant to be inserted in the assignment, that the plaintiff, his executors, administrators and assigns, should deal with them, and purchase at their brewery all the beer consumed in the house. No such covenant was inserted in the original lease.

[179]

Lord KENYON said, he would not now determine, nor was it necessary to do so, whether this was a binding covenant on the assignee. He thought it a question of some nicety, but whether it was or not, he thought it equally a defence to this action. When a man buys any commodity he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law. No man is obliged to buy a lawsuit.

Verdict for the defendant.

GRELLIER *v.* NEALE AND OTHERS.

(1 Peake, 198—199.)

1792. *July* 14. *At Guildhall.* [198]

If the defendant's hand-writing to a deed is proved, the jury may presume the sealing and delivery.

ASSUMPSIT for goods sold and delivered. The goods were sold to William Neale the first defendant, and Redhead, in whose names the business was carried on, but the plaintiff, discovering that the other defendants were dormant partners, brought this action against all.

To prove a partnership deed, the plaintiff's counsel called the subscribing witness, who said she did not see the deed executed, but that William Neale brought it to her, and desired her to put her name thereto as a subscribing witness, which she did, none of the other defendants being present. The plaintiff's counsel then offered to call witnesses to prove the hand-writing of the other defendants, which the defendants' counsel objected to; contending that as it was a deed under seal, bare proof of the hand-writing was not sufficient, but sealing and delivery must be proved.

LORD KENYON:

The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all;† and in that case the hand-writing may be proved by another witness. As to the objection that the sealing and delivery ought to be proved, I am clearly of opinion, that if the signature is proved to be the defendant's *hand-writing, we ought to presume that it was sealed [*199] and delivered.

The plaintiff then proved the hand-writing, and obtained a verdict.

Mr. Bearcroft, one of the plaintiff's counsel, said it was a point which had been frequently ruled.

† Under the then prevailing rule, which was subsequently altered by the C. L. P. Act, 1854 (17 & 18 Vict. c. 125, s. 26), it was *necessary* to call the person who had subscribed as a witness.—R. C.

1792.
July 17.

[202]

CATLEY AND ANOTHER *v.* WINTRINGHAM.

(1 Peake, 202—203.)

By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.

ASSUMPSIT against the defendant, as master of the ship *Betsey*, for not safely conveying a quantity of tallow from St. Petersburgh to London, and delivering it to the plaintiffs there.

The plaintiffs were consignees of the tallow in question; and the ship having arrived in the Thames, they sent a lighter to fetch the tallow from her. The lighter came on the Saturday, but the lighterman was then told, by the people on board the ship, that the tallow could not be put on board till the Monday following, at which time they desired him to call for it. He left the lighter lashed to the ship, and went again on the Monday, but not above half the tallow being put on board, he again left the lighter. In the following night the lighter was cut from the ship, and part of the tallow, to the value of 82*l.*, stolen thereout.

The plaintiffs were proceeding to call witnesses to prove that, by the custom of the river, the lighters were left by the side of the ship till completely loaded, and that the captain of the ship was obliged to watch them during that time; but they were stopped by the jury (which was a special one) who said they well knew the custom to be so.

In answer to this case, the defendant proved that when the lighterman came on the Monday, he told him he could not guard the lighter, not having a sufficient number of hands on board for [*203] *that purpose, but the lighterman left the lighter without returning any answer.

LORD KENYON:

The custom of the river must undoubtedly govern the parties.

There might have been a special contract, limiting the defendant's duty, but he could not do that by any act of his own without the consent of the other party.*

1792.

CATLEY v. WINTRINGHAM.

Verdict for the plaintiffs.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

GRAHAM AND OTHERS *v.* HOPE AND OTHERS.

(1 Peake, 208—209.)

1792. *Dec.* 4.

[208]

When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the "Gazette" is not sufficient to discharge them as against those per sons who have not seen it.

THE defendants had been in partnership together, and the plaintiff had sold them oods as partners. Afterwards the partnership was dissolved, and notice of the dissolution given in the "London Gazette;" and after this notice, the plaintiff had sold and delivered the goods for which the present action was brought.

* In the above case it seems to have been admitted that the master of the ship was only liable till the goods were fully loaded on board the lighter, but it has been since much contested whether the master is by the usage bound to take care of the lighter after it is fully laden until the time when it can be properly removed from the ship to the wharf. In a late trial on the question, it was held that the master was not obliged to do this, *Robinson* v. *Turpin*, Guildhall, sittings after Trinity Term, 1805, cor. Ellenborough, C. J. The action was brought by the owner of the goods against the lighterman, and the plaintiffs obtained a verdict. In a former trial, before Sir J. Mansfield, they had been nonsuited. See also *Sparrow* v. *Carruthers*, 2 Str. 1236; *Harry* v. *Royal Exc. Ass. Co.*, 2 B. & P. 430. In *Strong* v. *Natally*, 1 Bos. & Pul. N. R. 16, a policy being made on goods "until the cargo should be discharged and safely landed;" the goods were put on board a lighter and brought to the wharf of the consignee, but not landed on account of the rough weather. The consignee then discharged the lighterman, and undertook to see to the landing himself; and the lighter being afterwards sunk and the goods thereby lost, it was held that by this act of his own the consignee had discharged the underwriters, who would otherwise have continued liable.

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GRAHAM v. HOPE.

The defendants called witnesses, who swore that a notice had been given to the agent of the plaintiff, that the partnership was dissolved. The agent on the contrary positively swore that he had received no such notice.

Lord KENYON told the jury, that the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The "Gazette," he thought, was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. His Lordship said he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a "Gazette" to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had had dealings in partnership.

[209] The Jury, believing the defendants' witnesses, gave a

*Verdict for the defendants.**

* *Vide Gorham* and another v. *Thompson* and another, p. 650, *ante*, which seems at first sight to imply that the mere publication of an advertisement in the "Gazette" is sufficient proof of notice in all cases; and the same doctrine is to be collected from Mr. Espinasse's note of *Godfrey* v. *Turnbull* and *M'Cauley*, vol. i. p. 371, though according to my note of that case, the extent of the determination was, that the publication in the "Gazette" might be left to the jury as evidence of notice; but was not conclusive of that fact. The notes of that case so materially differing, I insert mine verbatim as taken at the time.

GODFREY v. MACAULEY and another, Guildhall, Sitting after Trinity Term, 35 Geo. III.

Assumpsit on a promissory note. The note in question was dated 6th of April, 1793, and made by the defendant Macauley, in the partnership name of Macauley & Co., in consideration of a sum of money then advanced to Macauley. Macauley had suffered judgment by default, the other defendant had pleaded the general issue.

Previous to the time that this note was given, viz., on the 19th March, 1793, the defendants had dissolved their partnership, and in the "Gazette" of that day an advertisement of such dissolution was inserted.

Erskine, for the plaintiff, contended that the "Gazette" was not of itself conclusive evidence of the plaintiff having had notice of the dissolution, and cited *Graham* v. *Hope*, but Lord KENYON saying, he agreed in opinion that the "Gazette" was not conclusive, he did not state the circumstances of that case.

It appeared that the plaintiff lived in London, and took in two daily papers, but not the "Gazette."

Lord KENYON said, that the "Gazette" was not evidence of notice any more than any other newspaper, unless in the cases where, by Act of Parliament, it was directed to be conclusive, such as bankruptcies; decrees of the Court of Chancery and *others, some of which even extended to make a man guilty of felony or treason. But in all cases, if published in the neighbourhood of a person, it ought to be left to the jury whether he had notice of it or not. His Lordship said, he remembered a case on the Circuit at Hereford, where a large sum of money was offered in an advertisement for apprehending a felon; it was proved that the newspaper, which contained the advertisement, was circulated in the neighbourhood of the person in whose name it was published. It was left to the jury to determine whether he knew of it, and they found for the plaintiff. So here, if it is probable that the plaintiff saw this "Gazette," it may be ground for the jury to find for the defendants. The defendants were not obliged to give actual notice to every person in the world. The jury will consider whether the plaintiff knew of it or not.

Verdict for defendant.

Many other cases have of late years occurred upon this subject. In *Jenkins* v. *Blizard*, 1 Stark. 419, Lord ELLENBOROUGH ruled, that proof of the insertion of a notice of dissolution, although but once, in a newspaper which the party was in the habit of taking in, and which was left at his house in the usual course, was evidence to be left to a jury, without strict proof of the particular paper ever having come to his hands. But in another case he held, that evidence of such insertion was not admissible without proof that the paper was taken in by the party, though the mere insertion in the "Gazette" was admissible without such proof, but that even an insertion in that publication was but weak evidence unless it was proved that the party was in [*209] the habit of reading the "Gazette," *Leeson* v. *Holt*, 1 Stark. 186, where the minute for advertising a dissolution of partnership in the "Gazette," signed by the parties, is produced as evidence of an actual dissolution, it requires an agreement stamp, per Lord KENYON in *May* v. *Smith*, 1 Esp. 283, 89. *Aliter* where the minute recites that the partnership had been dissolved, per Lord ELLENBOROUGH in *Jenkins* v. *Blizard*, *ub. sup.* *Doe* v. *Miles*, 1 Stark. 181. An alteration in the printed cheques is a sufficient notice of a change in the firm of a banking-house to customers who have used the new cheques. *Barfoot* v. *Goodall*, 3 Camp. 147, where a plaintiff who knew that an intention between partners to dissolve the partnership was in a course of execution, afterwards insists upon the continuance of the partnership, it lies upon him to shew that the intention has been abandoned. *Peterson* v. *Zachariah*, 1 Stark. 71. Notice by a copartner that the partnership has been dissolved, is evidence as against him that it has been dissolved by competent means, and therefore is evidence of a dissolution by deed, if a deed be essential to such dissolution, per Lord ELLENBOROUGH, C. J. in *Doe* v. *Miles*, *ub. sup.* [Partnership Act, 1890, ss. 36, 37.—F. P.]

1792.
Dec. 10.
At Westminster.
[212]

BERRY AND ANOTHER *v.* BANNER AND ANOTHER.

(1 Peake, 212—217.)

On an issue whether a church-warden ought to be elected by the select vestry, a record between a former church-warden and another person is admissible evidence.

If in pleading, it is stated, "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number.

So if it had been stated that the vestry was composed of a certain select number of persons *comme semble*. A select vestry cannot be constituted by a faculty from the Bishop.

THE plaintiffs declared in prohibition, and by their declaration alleged, that "there was, and from time whereof the memory of man, &c. had been within the parish of St. Martin in the Fields in the county of Middlesex, a vestry of the said parish, composed of a certain number of select persons parishioners and inhabitants of the said parish for the time being, called a Select Vestry; which said select vestry for the time being, during all the said time immemorial, on Easter Monday in every year, had [*213] been accustomed *to nominate and elect, and of ancient right and custom ought to nominate and elect, two parishioners and inhabitants of the said parish, to be and serve the office of church-wardens of the said parish of St. Martin in the Fields, for one year then next ensuing; which said persons, being parishioners and inhabitants of the said parish, so nominated, elected and chosen by the said select vestry, and none others, had, for and during all the time aforesaid, been duly sworn into, and served and executed, and by right of custom ought to have served the office of church-wardens of the said parish." The declaration further stated, that the plaintiffs were duly elected church-wardens by the select vestry, sworn into that office, and were entitled to sit in a pew in the parish church appropriated for the use of the church-wardens; nevertheless, that the defendants had wrongfully drawn the plaintiffs into a plea in the Spiritual Court; claiming a right to the said pew as church-wardens of the said parish.

The defendants pleaded the general issue; and for a writ of consultation said, that the right of election was in the

parishioners at large, and that they were elected by them, and duly sworn into their office, and traversed the custom set out in the declaration.

The plaintiffs, as a part of their evidence, offered the copy of a judgment in this Court, in Trin. Term 14 & 15 Geo. II. between Wm. Kendal and Sir Henry Penrice, the Official to the then Archdeacon *of Middlesex. That was an action for a false return. [*214] The plaintiff Kendal, and one Tucker, had been elected by the parishioners at large; and the select vestry had chosen the said Tucker and Wood. But the right of election then being disputed, Sir Henry Penrice refused to swear in either set of church-wardens, and left them to apply to this Court for a mandamus, which they accordingly did, and both obtained writs. The official swore in Tucker and Wood, and to the mandamus to swear in Tucker and Kendal returned that he had already sworn in Tucker and Wood as the church-wardens elected by the vestry. Upon which Kendal brought the action, and upon the trial, a verdict was found for the defendant.

Erskine, for the defendants, objected that this being *res inter alios acta*, could not be evidence in this cause.

LORD KENYON:

I am clearly of opinion it is evidence. I will not say whether it is conclusive or not. In questions of custom, such evidence is always admitted. If a right of common is claimed under a custom, and one person brings an action, the record in that cause is evidence between other parties.† If any fraud can be shewn that will destroy the effect of it; but if unimpeached, it is evidence very near conclusive, if not quite so.

The plaintiffs also proved a copy of judgment in Hilary Term, 1744, on a feigned issue, between Ferrers and Nind, "whether there then was, and *from time, &c. had been a vestry of the said [*215] parish, composed of a certain select number of persons parishioners of the said parish for the time being." Which was found in the affirmative.

† Carth. 181; Bull. N. P. 233.

1792.

BERRY v. BANNER.

Many entries in the parish books from the year 1625 to 1700, were read; from all which it appeared that the vestry was select, but that sometimes a larger and at other times a smaller number of the inhabitants attended.

Erskine here objected, that though the plaintiffs had proved that there was a select vestry, yet it was not proved that the vestry was composed of any certain definite number, but that on the contrary all the evidence shewed that the number was indefinite.

Bearcroft, for the plaintiffs, endeavoured to answer the objection by saying, that the word certain did not oblige the plaintiffs to prove a definite number. That the sum and substance of the allegation was, that there had been a select vestry. But that whichever way it was taken, there was evidence to go to the Jury, for that the words of this record, that the vestry was composed of a certain number of select persons, were synonymous with those used in the record between Ferrers and Nind, that it was composed of a certain select number of persons.

Lord KENYON said, he thought it was an objection which could not be got over; upon which the plaintiffs called a witness to prove that the select vestry had for some time consisted of 49.

[216] The defendants then proved a faculty from the Bishop of London, dated 28th of June, 1662, whereby he granted and confirmed to them that they should be a select vestry to consist of 49. They also examined some witnesses to prove that it was generally understood in the parish that the number of 49 was only established by the faculty.

Bearcroft, in his reply to the Jury, still contended that no precise definite number need be proved to sustain the issue. Suppose this had been in Latin, as legal proceedings formerly were, it would have been *quidam numerus*, this means no more than "a number," but lawyers when expressing that in English, could not so well do it, without literally translating it, and saying a certain number. When we speak of a certain man in telling a

story, we mean some human being, but no one particular person. He then contended, that the evidence he had adduced proved that a vestry, consisting of 49, existed before the faculty was granted; and that if this was an averment, that the vestry was composed of a settled, definite number, the record in the former cause equally contained such an averment.

LORD KENYON (to the Jury):

At the time I interposed, I had an idea that the plaintiffs on this issue, must prove that the vestry consisted of a certain number. I still retain that opinion. The question for you to consider is, whether the plaintiffs have made out a certain number. There are some things respecting the good government of the church, which belong wholly to the ordinary; the *disposal [*217] of seats, where there is no prescriptive right, the ordering of devotion, &c. But by the common law, all the parishioners who pay scot and lot have a right to be of the vestry. By immemorial custom this right may be restrained to a select number, and it is highly convenient in populous parishes that it should be so; but still it cannot be done but by immemorial custom. The faculty *proprio vigore*, is a dead letter, though it may be evidence of the antecedent right. *Mr. Bearcroft* very properly got up and said, he would give proof of a certain number, and admitted that the faculty was not sufficient of itself. The word *grant* in the faculty seems to introduce something new, but the word *confirm* supposes an antecedent custom. I have no doubt but there is a select vestry; the only question is, whether there is any slip in the proceedings. I am not sure that there is any difference in the words of these two records; I rather think the former verdict is evidence of a certain select number. In 1625, persons were elected in the place of persons dead, it therefore shews a certain number, or why say, in the place of others. If you think the faculty only fixed a certain number, you must find for the defendants: If the verdict in 1744, and the other evidence, prove a determinate number from time immemorial, the plaintiffs are entitled to your verdict. It is for you to decide.

The jury found a verdict for the plaintiffs.†

† *Vide* 4 Burn's Eccl. L. 8, 9.

1793.
Feb. 16.
At Westminster.
[223]

K. B. (AT NISI PRIUS) SITTINGS AFTER HILARY TERM.

REX *v.* BUTCHER AND OTHERS.

(1 Peake, 226—227.)

Bail above put in by the sheriff (who had discharged the defendant without a bail bond) may surrender the defendant.

THESE defendants were indicted for the rescue of one Philip Evans from his bail, when they were going to surrender him in their discharge.

A writ on the Lottery Act requiring bail for 500*l.* had issued out of the Court of Common Pleas against Evans, and he was arrested thereon by a sheriff's officer of the name of Coulson. Coulson discharged the defendant without taking any bail bond; and after the return of the writ, fearing that the sheriff might be called on, prevailed on Purnel and Dennis to become bail above. They immediately went to take Evans into their custody for the purpose of surrendering him. Purnel and Dennis had never seen Evans on the subject of their becoming bail, nor did they even know him. Evans on being thus suddenly seized, opposed [*227] *Purnel and Dennis, and the defendant assisted him in making his escape.

Marryat, for the defendants, contended that the sheriff's officer having voluntarily permitted Evans to escape, could not surrender him after the return of the writ, either by taking him himself, or in a circuitous way by putting in bail above, and causing them to surrender him.

LORD KENYON:

The bail had a right to surrender the defendant. They were his bail, and whether with or without his consent was immaterial; they had still the right, and they told him they were come for the purpose of surrendering him. If he resisted them it was at his peril: it would be so even in the case of death, and had

either of the bail been killed, all the defendants would have been guilty of murder. They should have submitted, and not taken the law into their own hands.

The defendants were convicted.†

REX *v.* DOWLIN.

(1 Peake, 227—228.)

1793.
Feb. 19.
At Guildhall.
[227]

Though to support an indictment for perjury committed on a former trial the prosecutor must in general prove the whole of the defendant's examination, yet when the perjury was committed in swearing to a fact not connected with the general merits of the cause, proof of the cross examination only is sufficient.

THIS was an indictment for perjury, committed on the trial of John Kimber, for the murder of a *negro girl on board a slave ship, of which Kimber was commander. [*228]

Amongst other questions asked the defendant on his cross examination, one was, "whether he had not declared to Mr. Jacks that he would be revenged of Kimber, and work his ruin." He swore he had made no such declaration, and upon that answer perjury was assigned. There were also assignments of perjury on the evidence given by the defendant as to Kimber's treatment of the girl.

The short-hand writer could not prove the whole of the examination in chief, as he had only taken down particular parts of it, but he proved all that was sworn on the cross examination.

Lord KENYON said, that to convict a defendant of perjury, he should always require the whole of his evidence to be proved, for a man might explain by one part of his evidence what he had sworn in another; and therefore as to the perjury assigned on the defendant's evidence concerning Kimber's behaviour to the girl, he would not proceed on it. But the question as to what passed between the defendant and Jacks, was entirely unconnected with the original examination. That question could arise on the cross examination only, and every thing which the

† *Vide Berchere et al'* v. *Colson*, 2 Stra. 876, accord.

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REX
v.
DOWLIN.

defendant swore on that examination being proved, the prosecutor might proceed to falsify it.

*The defendant was convicted on that assignment.**

1793.
Feb. 25.
[233]

MACDONALD *v.* STEELE, ESQ., AND ANOTHER.

(1 Peake, 233—235.)

The King may at any time stop the half-pay of an officer in the army by signifying his pleasure that it shall be no longer paid.

THIS was an action on the case against the defendants as paymasters general of the forces, for not giving their draft on the bank for a sum of money due to the plaintiff for his half pay.†

[234] It appeared that the plaintiff still continued on the list of half-pay officers, but the defendants proved that the plaintiff being indebted to the agents of the regiment in a large sum of money, on account of money over-drawn by him, they entered a caveat to prevent his receiving half-pay; and in consequence of that caveat Sir George Yonge, the Secretary at War, sent a letter to the pay-office signifying his Majesty's pleasure that the pay should not be continued to the defendant longer than Christmas, 1789.

Erskine, for the plaintiff, said that the pay appeared to have been stopped before the King's pleasure was signified. The pay-office could not stop the payment on account of the debt due to the agent, though if the agent was indebted to the Crown an extent in aid might have secured this money. He admitted that the Crown had the absolute control of the army, but this sum of money having been appropriated by Parliament for the express purpose of paying the forces, the King could not, merely by signifying his pleasure, deprive the plaintiff of the money so appropriated.

Lord KENYON said, he was clearly of opinion that the pay-office

* *Vide Rex v. Jones*, 1 Peake, 51.

† *Vide Lidderdale* v. *Duke of Montrose and Another*, 2 R. R. 375; and *Flarty* v. *Odlum*, 1 R. R. 791.

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MACDONALD v. STEELE.

could not stop for the debt due to the agent. If the public had a demand on the plaintiff that might be set off against the present action. But his Majesty's pleasure supersedes all enquiry, as he has the absolute direction and command of the army. It is true, Parliament has provided a sum of money, but that is to be *distributed as the King chooses. The money is under his control till such time as it is paid out. The King cannot take it for his own use, but he may prevent it from being paid to a person who is not entitled to receive it. The caveat of the agent was merely waste-paper till adopted by the King; when he adopted it, it became his own act; and it is for the honour of Government to see that money due to an officer is applied to the payment of his debts.

[*235]

The plaintiff was nonsuited.

Note.—Mr. Bearcroft, in opening the defendant's case, said that the money was not stopped on account of a debt due to the agents, but for a debt due to the Crown for money remaining in the plaintiff's hands as paymaster of the 84th Regiment; but this was not proved.

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

COLE AND ANOTHER *v.* BLAKE.

(1 Peake, 238—239.)

1793. *June* 24.

At Westminster.

[238]

If on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt.

THIS action was brought to recover a sum of 15*l.* 2*s.* which the plaintiffs claimed to be due to them for work and labour done as surveyors. The defendant pleaded a tender of ten guineas.

It clearly appeared that the plaintiffs were not entitled to receive more than ten guineas, but the witness who proved the tender, on his cross examination said, that he believed he had

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COLE
v.
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[*239]

asked for a receipt in full, and added that he should not have paid the money unless the plaintiffs would have given such receipt. But he said further that the plaintiffs insisted on payment of 15*l.* 2*s.* for *this work, and did not pretend to have any other demand on the defendant, or object to the formality of the tender on account of the receipt being demanded.

Lord KENYON was clearly of opinion that the tender was proved. His Lordship said that it had been determined, that a party tendering money could not in general demand a receipt for the money. There had been one case indeed in the Exchequer, in which Sir Watkin Williams was a party, where it was determined that the King's receiver was obliged to give a receipt,† but that was an exception to the general rule. In this case, however, the dispute between the plaintiffs and the witness was not whether a receipt should be given or not, but whether the sum tendered was sufficient; and, as it clearly appeared on the plaintiff's own evidence that the sum tendered was sufficient to satisfy the whole demand, he was of opinion the defendant was entitled to a verdict on the plea of tender.

Verdict for the defendant.‡

† *Vide* Bunbury, 348.

‡ *Vide Black* v. *Smith*, p. 661 *ante*, and *Read* v. *Golding*, 2 Maule & S. 86.

LOCKYER *v.* JONES, K.B. Guildhall, Sittings after Hilary Term, 36 Geo. III.

Assumpsit for money lent, to which the defendant pleaded a tender of 10*l.*

The plaintiff endeavoured to prove a debt of 40*l.*, but was not able to prove more than 10*l.*; and the defendant in support of his plea, proved, that in July, 1795, the plaintiff and he *having an altercation about the money due from him to the plaintiff, he tendered a 10*l.* Liverpool Bank Bill of Exchange to the plaintiff, which he refused to accept, insisting on being paid the whole of his debt.

[*240]

The plaintiff's counsel contended, that this was no legal tender, and attempted to distinguish this from the case of a bank note, which, in the ordinary transactions of mankind, was considered as cash.

But Lord KENYON said, that though he was not inclined to give a greater credit to paper of this kind than it already possessed, yet he was of opinion, that the tender in the present case was a good one; that even a bank note was no tender if objected to by the creditor; but the plaintiff in this case was precluded from now objecting to the legality of the tender by his conduct at the time it was made; he did not then object to it on account of the form in which it was made, but

JACKSON *v.* ATTRILL.

(1 Peake, 241—242.)

1793. *June* 24. *At Westminster.* [241]

The statute of the 24 Geo. II. against selling liquors in quantities under the value of 20*s.* does not extend to liquors sold for the purpose of being sold again.

ASSUMPSIT for the use and occupation of part of a house, and for goods sold and delivered.

The plaintiff was a liquor merchant, and the defendant took one side of a house belonging to him, the other side being occupied by one Eaton, who sold liquors on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there, were had from Eaton, as they were wanted. Many of the items in the bill for liquors were under 20*s.* By the statute 24 Geo. II. c. 40, s. 12,* it is enacted, "that no person or persons whatsoever shall be intitled unto or maintain any cause, action or suit for, or recover either in law or equity any sum or sums of money, debt or demands whatsoever for or on account of any spirituous liquors, unless such debt shall have been, and *bonâ fide*, contracted at one time to the amount of 20*s.* or upwards: nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time and mentioned in such article or item shall not amount to the full value of 20*s.* at the least, and that without fraud or covin."

because it was not sufficient to cover his demand. Had he then objected to it on account of its informality, the defendant might have taken the money from his pocket and tendered that.

Verdict for the defendant.

Mingay and *Peake* for plaintiff.

Erskine for defendant.

This point arose again in the case of *Mills* v. *Safford*, Exch. East. T. 48 Geo. III. when the Court held, that a tender of a Bristol bank bill was not a good tender, though no objection was made to it on that account. But in a subsequent case in the King's Bench, this latter case was again overruled, and the decision of Lord KENYON in *Lockyer* and *Jones* established as law. In *Glascott* v. *Day*, 5 Esp. 48, and *Huxham* v. *Smith*, 2 Camp. 21, Lord ELLENBOROUGH held, that a tender, accompanied with a demand of a receipt in full, was bad.

The cases on tender are very fully collected and compared in "Benjamin on Sales," book iv. part iii. ch. 2.—R. C.

* This section is partially repealed by 25 & 26 Vict. c. 38.—R. C.

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JACKSON v. ATTRILL.
[*242]

Garrow, for the defendant, contended that the plaintiff could not recover in the present action for such liquors as were sold in quantities of less *value than 20*s*. They were sold directly in the teeth of this Act of Parliament, which is positive and without any qualification or exception.

Lord KENYON thought this case did not fall within the mischiefs intended to be remedied by this Act of Parliament, the intent of which was to prohibit the sale of such small quantities to the consumer. This was done for the purpose of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of society. In the present case the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore, in his Lordship's opinion, not within the Act of Parliament. His Lordship said that he would take a note of the objection, and the defendant might move the Court if he thought proper.

Verdict for the plaintiff.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

1793.
Dec. 4.
At Westminster.
[253]

HEARN AND ANOTHER *v.* TOMLIN.

(1 Peake, 253—255.)

Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance at a considerable expense enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation.

THIS was an action for the use and occupation of a wharf.

The plaintiffs had agreed to sell the wharf to the defendant, and stated that the lease had thirteen years to run. Under this contract the defendant entered into possession of the wharf; but it being afterwards discovered that the plaintiffs had an interest

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HEARN v. TOMLIN.

in the premises for three years only, the defendant refused to complete his purchase. The first witness proved, that so far from being a beneficial occupation to the defendant, he had been put to great expense in removing timber to the wharf which was intended to continue there some years.

LORD KENYON:

To maintain an action for *use and occupation, it must appear that the occupation has been beneficial to the defendant. This occupation was injurious to the defendant, who, had he been told that the plaintiffs had only a term of three years in the premises, would never have entered upon them, and the plaintiffs shall not be permitted to make this the ground of an action. [*254]

His Lordship therefore directed a nonsuit.

UPSDELL *v.* STEWART.

(1 Peake, 255—256.)

1793. *Dec.* 4.

At Westminster.

[255]

A surveyor is to be paid according to his labour, and not according to the amount of the bills he looks over and settles.†

ASSUMPSIT for work and labour as a surveyor. The plaintiff demanded 34*l.*, being 5*l.* per cent. on all money charged by, and allowed to the different tradesmen. The defendant had paid one half of the sum demanded into Court, contending that 2½ per cent. was a sufficient compensation for the business the plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house.

Garrow, for the plaintiff, offered to call witnesses to prove that the uniform practice of surveyors was to charge 5*l.* per cent. on all money allowed to the workmen; and instanced the case of surgeons and others, whose fees were settled by the *evidence of professional men, as to the usual charge on such occasions. [*256]

† Same rule applied to the percentage of 7½ per cent. charged by auctioneers, *Maltby* v. *Christie*, 1 Esp. 340.

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UPSDELL v. STEWART.

LORD KENYON:

The plaintiff is entitled to a reasonable compensation for his labour, but he is not to estimate that by the money laid out by the defendant in finishing his building.

I am bound to give my opinion on the matter of law, the jury will answer as to the fact. I am enabled to state from the record what is the true question between the parties. The plaintiff states his demand to be "as much as he reasonably deserves to have for his work and labour." Does he reasonably deserve to have this exorbitant demand? As to the custom offered to be proved, the course of robbery on Bagshot Heath might as well be proved in a court of justice. It ought not, nor cannot be supported.

On his Lordship expressing himself thus strongly, *Garrow* consented to

A nonsuit.

1793. *Dec.* 6.

[256]

ASHLEY *v.* HARRISON.

(1 Peake, 256—258.)

The proprietor of a public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage.

THIS declaration stated, that the plaintiff during the time of Lent, 1793, caused to be performed every Wednesday and Friday [*257] night, by divers *singers and musicians at a certain place of public amusement called Covent Garden Theatre, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances; by means whereof he derived great gains, &c. yet the defendant knowing the premises, but contriving to lessen the profits, &c. and to terrify, deter, &c. a certain public singer called Gertrude Elizabeth Mara; who had been before that time retained by the plaintiff to sing publicly for him at the said place, &c. from so singing; wrote and published a certain false and malicious paper writing of and concerning the said G. E. Mara, and of and concerning her conduct, as such public singer as aforesaid, containing therein, &c. The libel was then

set out, and the declaration concluded, that by reason thereof the said G. E. M. could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented, and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been.

On the opening of the cause, Lord KENYON expressed his disapprobation of the action, but on *Erskine*, for the plaintiff, suggesting, that the objection was on the record, his lordship permitted the cause to proceed.

The declaration was proved, and Madame Mara said, that "she did not choose to expose herself to contempt again, and therefore refused to sing."

When the defendant's counsel were proceeding to their defence, they were stopped by [258]

LORD KENYON, who said:

This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress. Madame Mara says, she did not choose to expose herself to contempt again. The action then is to depend entirely on the nerves of the actress; if she chooses to appear on the stage again, no action can be maintained; if she does not, her refusal is to be followed with an action. In actions for defamation whereby a woman loses her marriage, it is not sufficient to prove that she was a virtuous woman, and one who might reasonably hope to have settled well in life; but a marriage already agreed upon must be shown to have been lost.*

The plaintiff was nonsuited.†

* *Vide* Cro. Eliz. 787; Cro. Jac. 422; Lut. 1296; Latch. 218.

† *Vide Tarlton* and others v. *M'Gawley*, p. 689, *post*; Cro. Jac. 567;

1793.
Dec. 7.

[259]

DOE *d.* WILLIAMS AND ANOTHER *v.* PASQUALI.

(1 Peake, 259—260.)

A refusal to pay rent to a devisee in a will which was contested is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit.

THE defendant came into possession of the premises for which this ejectment was brought, as tenant to Daniel Morgan, who devised the same to the lessors of the plaintiff upon certain trusts mentioned in his will. The will of Morgan had been contested in the Ecclesiastical Court, and it was proved that the defendant had frequently said he was ready to pay his rent to any person who was entitled to receive it; but doubting whether the will was duly made, he had refused to pay it to the lessors of the plaintiff. He had paid part of this rent to a man of the name of Parke, who had collected rents for Morgan in his lifetime.

The plaintiff's counsel contended that this refusal of the defendant was such a disavowal of the lessors of the plaintiff's title, as entitled them to consider the defendant as a trespasser, and eject him without any notice to quit.

Lord KENYON said, this was not such a case as rendered a notice unnecessary. It had been held that if a tenant put his landlord at defiance, he might consider him either as his tenant or a trespasser, and in the latter case need not give him a notice to quit before he brought his ejectment: but that was not the case here, for the defendant professed himself ready to pay to any person who was entitled to receive: nay, it is proved that he [*260] *actually paid a considerable part of his rent to Parke, who was the collector of Morgan in his lifetime, and the only person he could trust.

The plaintiff was nonsuited.†

Roll. Rep. 162; S. C. 1 Roll. Abridg. 107, 108; 1 Bac. Abr. 53. In *Taylor* v. *Neri*, 1 Esp. 386, where a person engaged by the manager of a theatre as a public singer had been beaten, and thereby prevented from performing, EYRE, C. J., held, that the manager could not maintain an action for the remote injury which he sustained in consequence.

† *Vide* Bull. Ni. Pri. 96.

TARLETON AND OTHERS *v.* M'GAWLEY.

(1 Peake, 270—274.)

1793. *Dec.* 21.

[270]

An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the plaintiff. And it is no answer to such action that the plaintiff had not conformed to the law of the country in paying the duty due to the King for his licence to trade.

THIS was a special action on the case. The declaration stated that the plaintiffs were possessed *and owners of a certain ship [*271] called the *Tarleton*, which at the time of committing the grievance was lying at Calabar on the coast of Africa, under the command of ——— Fairweather. That the ship had been fitted out at Liverpool with goods proper for trading with the natives of that coast for slaves and other goods. That also before the committing the grievance Fairweather had sent a smaller vessel called the *Bannister* with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to another part of the said coast called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he well knowing the premises, but contriving and maliciously intending to hinder and deter the natives from trading with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the *Othello*, of which he was master and commander, a certain cannon loaded with gunpowder and shot at the said canoe, and killed one of the natives on board the same. Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith, for the benefit, &c. and plaintiffs lost their trade.

Erskine, in his opening for the plaintiffs, distinguished this case from that of *Ashley* and *Harrison*,† where Lord KENYON had held the injury *to be too remote to be the foundation of an [*272] action; that decision, he said, was founded on principles recognized

† *Ante*, p. 68*c*.

1793.

TARLETON v. M'GAWLEY.

by the law of England from the earliest antiquity. So long since as the days of Bracton it was held that to constitute a duress in law it must not be "suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui, in se contineat vitæ periculum, aut corporis cruciatum."† But in this case the plaintiff's loss was not occasioned by the vain fears of the negroes, or even the fear of a battery being committed on them, but a fear arising from the danger of life itself.

The plaintiffs called Thomas Smith, who proved the facts stated in the declaration; and further, that the defendant had declared the natives owed him a debt, and that he would not suffer any ship to trade with them until that was paid; in pursuance of which declaration he committed the act complained of by the plaintiffs. On his cross examination he admitted that by the custom of that coast no Europeans can trade until a certain duty has been paid to the king of the country for his licence, and that no such duty had been paid, or licence obtained by the captain of the plaintiffs' vessel.

Law, for the defendant, contended that the plaintiffs being engaged in a trade which by the law of that country was illicit, could not support an action for an interruption of such illicit [*273] commerce, and compared this case to an action brought *for interrupting a plaintiff in his endeavours to smuggle goods into this country, or alarming the owner of a house which the plaintiff was about to break into. He also objected that this act of the defendant amounted to a felony, and therefore could not be made the ground of a civil action, but he did not lay much stress on this objection.

LORD KENYON:

This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The

† Brac. l. 2, c. 5.

whole of the case is stated on the record, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will. This case has been likened to cases which it does not at all resemble. It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffic. That I entirely accede to, but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, and a *jus positivum* is not binding on foreigners. The king of the country and not the defendant should have executed that law. Had this been an accidental thing, no action could have been maintained, but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any Court in that country to which he could have applied for *justice he might have done so, but he had no right to take the law into his own hands. [*274]

The plaintiffs had a verdict, and the parties agreed to refer the damages to arbitration.

Note.—In the beginning of the cause the plaintiffs' counsel proposed asking the witnesses whether some of the negroes did not assign their fear of the defendant as a reason for not trading with the plaintiffs, but Lord KENYON said that no declaration of the negroes could be received in evidence.†

† *Vide Carrington* v. *Taylor*, 11 East, 571.

K. B. (AT NISI PRIUS) Sittings after HILARY TERM.

1794.
March 3.

At Guildhall.
[277]

MINETT and Others *v.* ANDERSON.

(1 Peake, 277—278.)

If a policy be on a ship bound to a foreign port until she is twenty-four hours moored in safety there; and previous to such ship's arrival at her destined port an embargo is laid on all English vessels in that port, and she on entering it is also detained, and her crew made prisoners of war, the assured is entitled to recover.

Assumpsit on a policy of insurance on the ship *Hercules* from Bilboa to Rouen, and until she had been 24 hours moored in safety there.

The ship arrived at Rouen on the 1st of February, 1793, an embargo having been previously laid on all English vessels in that port. The captain went on shore the day he arrived, and an embargo *was the next day laid on his ship. He was afterwards permitted to land his cargo, and delivered it to the consignees, who were merchants at Rouen, but the ship was detained as a prize, and the captain and crew allowed subsistence as prisoners of war, from the time of their arrival.

[*278]

The defendant offered evidence to prove that no guard was put on board the ship, till some days after her arrival.

Lord Kenyon:

That would not alter the case. She was as much within the power of the enemy as if a guard had been put on board the moment she arrived. She could not be said to be 24 hours, or a minute moored in safety, as far as relates to these plaintiffs; for immediately she entered the port she was to all intents and purposes captured by the French.

Verdict for the plaintiffs.

GREEN AND OTHERS *v.* ELMSLIE.

(1 Peake, 278—279.)

1794. *March* 4.

[278]

If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture and not by the perils of the seas.

THIS action was on a policy of insurance on the ship *Fly* from Exeter to London. The insurance was against capture only.

The ship while on her voyage was driven by a hard gale of wind on the coast of France, and was there captured by the enemy: she did not receive any damage from the wind.

Erskine contended that this was a loss by the perils of the seas, and not by capture, and that therefore the defendant was not liable on this policy. [279]

But Lord KENYON said, the case was too clear to admit of argument; this was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety.

Verdict for the plaintiffs.

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

SEDDONS *v.* STRATFORD.

(1 Peake, 281—282.)

1794. *July* 11.

At Guildhall.

[281]

A man who at the request of the holder of a note, has put his name upon it and thereby been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration.

ASSUMPSIT by the plaintiff as indorsee of a promissory note against the defendant, who was the payee and first indorser. Counts for money paid, &c.

The note in question was made by Thomas Bell and the consideration on which it was given, premiums for the insurance of

1794.

SEDDONS v. STRATFORD.

tickets in the lottery. Stratford, the defendant, indorsed it to Clode, who had notice of the illegal consideration on which it was founded: he offered it to Cowley in payment for some goods which he bought of him, but Cowley refusing to trust Clode with the goods unless he could get the name of some other person as an indorser of the note, Clode prevailed on the *present plaintiff to indorse the note, and then paid it to Cowley. When the note became due, the plaintiff was obliged to pay it to Cowley. One of the plaintiff's witnesses swore that the plaintiff told him he knew the consideration on which the note was given.

[*282]

Shepherd, for the defendant, objected that on this evidence the plaintiff could not recover, for, the note being given on an illegal consideration, an indorsee, to entitle himself to recover against the indorser, should shew that he had paid a valuable consideration for it.

LORD KENYON:

It has been frequently held in the Court of Chancery, that a mere volunteer, who has been obliged to pay money in consequence of an obligation he has entered into, is entitled to recover that money from the person on whose behalf he has paid it. The plaintiff was obliged to pay this money to Cowley, who came fairly and honestly by the note, and had a right to recover the value of it from any person who appeared to be a party to it. The plaintiff derives his title from him, and the defendant being clearly liable to pay the money to Cowley, it is no injury to him to be obliged to repay it to the plaintiff who has paid it for him.

Verdict for the plaintiff.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

FORD *v.* FOTHERGILL.

(1 Peake, 301—303.)

1794. *Nov.* 29.

At Westminster.

[301]

An action does not lie against an infant for necessaries, if it appears at the time that he was sufficiently provided. If the plaintiff omits inquiry, it is at his peril.†

ASSUMPSIT for work and labour as a tailor.

The defendant pleaded that at the time of making the promises he was an infant; and the plaintiff replied that the clothes furnished were necessary for him.

The case appeared to be shortly this. The defendant, being under age, came to the house of the plaintiff, in company with a gentleman who was previously his customer, and ordered a coat, waistcoat, and two pair of breeches, which were to be sent to the Grecian Coffee-house, and were accordingly sent there.

The defendant proved that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, *and his father had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other tailors to a large amount. [*302]

Mingay, for the plaintiff, contended, that it was not incumbent on the plaintiff to traverse the town to inquire the defendant's fortune and character. He came to him as a man of fortune and figure, introduced and recommended by a gentleman of fortune. If the plaintiff thought them necessary for his state and degree, that would maintain the issue. In the way he appeared to the plaintiff he could not know but that he had an estate of 500*l.* per annum.

Lord KENYON (after lamenting the profligacy and extravagance of the youth of the present day, and the encouragement they received from persons trusting them with things for which they had no occasion) said, that from the earliest ages and in all countries, the law had protected men at the time of life when

† *Acc. Johnstone* v. *Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6.—F. P.

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FORD
v.
FOTHERGILL.

they had not wisdom to protect themselves. Nothing is clearer in the law than that an infant cannot contract a debt except for necessaries. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the plaintiff not knowing his fortune, it is no excuse, it was incumbent on him to inquire into that, and to prove it to the jury. Whether he was living with his father or not, the person who dealt with him was bound to inquire and know who he was. He was living at a coffee-house, itself no [*303] mark of a wary *disposition: the plaintiff should have inquired there, and gone to his father and inquired of him whether he was in want of these clothes. Circumstanced as this case is, such an inquiry ought to have been made.†

Notwithstanding this direction, the jury found a

Verdict for the plaintiff.

Bearcroft for the defendant.

1794.
Dec. 2.
At Westminster.
[303]

REED *v.* PASSER AND OTHERS.

(1 Peake, 303—305.)

The Fleet books are no evidence.

But the general reputation of the family that the parties were married in the Fleet is good evidence.

The registration of a marriage is not absolutely necessary to make it valid.

SEVERAL issues were directed by the Court of Chancery to be tried between these parties; but the first and only issue which

† *Vide Bainbridge* v. *Pickering*, 2 Blac. 1325. In *Maddox* v. *Miller*, 1 Maule & S. 378, which case was in its circumstances much like the above, Mr. Justice BAYLEY at N. P. nonsuited the plaintiff, on the ground that he had not affirmatively proved that the clothes were necessaries; but afterwards on motion for a new trial, the Court held, that whether so or not was a mixed question of law and fact, and ought to have been left to the jury. The cause was afterwards tried a second time before Mr. Justice DAMPIER, when, under a strong direction from him that they were not necessary to the defendant's degree, the jury found a verdict for the defendant. In another case of *Bliss* v. *Palmer*, Oxford Summer Assizes, 1817, cor. Abbott, J., his Lordship took the same course, strongly enforcing the doctrine that the *onus* was upon the plaintiff to shew the necessity of the articles furnished, and in that case also a verdict passed for the defendant.

was contested between *them was, whether the plaintiff was the heir-at-law of Ann Botham deceased.

The plaintiff and Ann Botham were brother and sister, but it was contended by the defendants, that their father and mother were never married, and therefore that they were both illegitimate.

Garrow, in opening the plaintiff's case, said that he should prove by the friends and relations of this father and mother, that they were generally looked upon in the family as man and wife, and visited and treated as such. In addition to this, he said, he should produce one of the Fleet registers, which contained an entry in March, 1753, of a marriage being celebrated between them.

LORD KENYON:

I must be consistent with myself; I did hold, on the last Home Circuit, that these books were no evidence whatever. Mr. J. HEATH, I am told, afterwards ruled otherwise at Shrewsbury† but I cannot depart from my opinion. I have since looked into the books, and find my opinion strongly fortified by authorities. There is a case of *Morris* and *Miller*‡ in Sir James Burrows' Reports, which is in favour of the opinion I have given; there it was taken for granted that such books could not in any case be received as evidence. This is my opinion; it must guide my conduct. If others differ from me, it is very fit that my opinion should be considered.

When a witness was called to prove the general reputation that they were man and wife, *Mingay*, for the defendants, asked him whether the parties did not say they were married in the Fleet; and upon the witness answering in the affirmative, objected to the testimony, contending that as the Fleet books were themselves no evidence of a marriage, any reputation of a marriage there was also inadmissible. [305]

LORD KENYON:

The books cannot be received, because they come from tainted

† *Doe dem. Passingham* v. *Lloyd*, Shrewsb. Summer Assizes, 1794.

‡ 4 Burr. 2057.

1794.
REED v. PASSER.

quarters, but the declaration of the parties that they were married there is good and strong evidence. A marriage in the Fleet at that time was good and legal. I think, though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti*, was *ipsum matrimonium*.*

The plaintiff having made a strong case by this kind of evidence, and no answer being given to it by the defendants,

Lord KENYON said, that even since the Marriage Act it was not essential to the legality of the marriage that there should be a registration, but the Act of Parliament making it criminal in the clergyman not to do it, it is generally done. But still a marriage, since that Act might be proved by reputation as well as one before.†

The jury found for the plaintiff. ‡

1794.
Dec. 5.
[307]

DICKENSON *v.* BROWN AND OTHERS.

(1 Peake, 307—308.)

A justice's warrant continues in force until fully executed. If the putative father of a bastard child agrees to indemnify the parish, they may demand any security they think proper.

TRESPASS for breaking and entering the plaintiff's house, and imprisoning him. The defendant justified the trespass, under a justice of peace's warrant to apprehend the plaintiff as the puta-

* *Vide Holt* v. *Ward Clarencieux*, 2 Stra. 937, and 8 Swinb. 74; 2 Salk. 438; 6 Mod. 155; and *Rex* v. *Inhabitants of Brampton*, 10 East, 282.

† *Vide Rex* v. *Prestonnent Travasham*, Bul. N. P. 114.

‡ *Vide Standen* v. *Standen*, 1 Peake, 45; and *Lawrence* and others v. *Dixon*, 1 Peake, 185. The Fleet books were also rejected by Lord C. J. DE GREY, in *Howard* v. *Burtonwood*, C. B. Sittings at Westminster, after Trin. T. 1776, M. S., and in former cases by Lord HARDWICKE and Lord C. J. LEE; and also by Mr. Justice LE BLANC, in *Cooke* v. *Lloyd*, Salop Summer Assizes, 1803; but in the case of *Haywood* v. *Firmin*, C. B. Sittings after Easter T., 1766, M. S. Lord C. J. PRATT held, as Lord KENYON did in the present, that the declarations of the mother that she had been married in the Fleet, were good evidence after her death. This case of *Reed* v. *Passer* afterwards came on in the Court of Chancery, when Lord Chancellor ELDON was also of opinion that the Fleet book was not evidence as a register, 1 Cooper, Ch. Cases, 152.

tive father of a bastard child, in order to indemnify the parish, or enter into a recognizance for his appearance at the sessions.

To this plea the plaintiff made a new assignment, stating that after the plaintiff had been apprehended, and executed a bond to indemnify the parish, and at a different time from that stated in the plea, &c. the defendants committed the trespasses complained of.

It appeared that on the 2nd of October, 1793, the plaintiff was apprehended under the warrant, and then went to the vestry, where he agreed to enter into a bond with two sureties to indemnify the parish. He and one of the sureties then executed the bond, but the other surety did not. On the 17th of January, 1794, the plaintiff was again apprehended by the direction of the parish officers, in order to compel him to procure another surety. No fresh warrant had been obtained.

Mingay and *Espinasse*, for the plaintiff, contended that the second arrest was illegal and could not be justified, that when the plaintiff had been once apprehended, the warrant was executed, and that, *supposing the parish were not sufficiently [*308] indemnified, yet before he could be apprehended a second time, a new warrant should have been obtained for that purpose.

Lord KENYON said, that the warrant of a magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, though it were seven years, provided the magistrate so long lived. That the warrant was not in this case fully executed, the parish officers had a right to have any security they required, however large, if the business was settled in that way. This was no hardship on the plaintiff, for he was not obliged to enter into any such security, but might enter into a recognizance to appear at the sessions, and abide such order as they should make.†

Verdict for the defendants.‡

† *Vide* Stat. 6 Geo. II. c. 31, and 1 Burn's Just.

‡ A warrant to arrest a person that he may be bound to appear at the next session of Oyer and Terminer, may be executed at any time, *Mayhew* v. *Parker*, 8 T. R. 110.

1794.
Dec. 13.
[318]

LEWIN AND OTHERS *v.* THE EAST INDIA COMPANY.

(1 Peake, 318—321.)

If a ship be chartered to the East India Company for the purpose of trade or warfare, and they order her on a voyage of discovery, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage.

THIS was a special action on the case. The declaration stated, that the plaintiffs being owners of a ship called the *Vansittart*, by a charter-party of affreightment, dated 13th of August, 1788, let the same to the defendants to freight for a certain voyage with her to be made in trade and also in warfare, as the said Company, or any their governors, &c. should require or direct. That the plaintiffs thereby covenanted that the ship should be used by the company in trade or warfare, if required by the company, that the master should observe the orders of the company, and that they should have power to displace him or any other officer or officers belonging to the ship. The declaration then stated, that the ship sailed on her voyage, and was engaged in the service of the defendants; and that they, without the knowledge or consent, and against the will of the plaintiffs, employed the said ship in [*319] and upon a certain *voyage and service, not being a voyage and service of trade or of warfare, and not being a voyage or service mentioned in, or intended to be warranted by the charter-party, or upon which the said ship ought to have been employed; to wit, in and upon a certain voyage and service of observation and discovery, in and to a certain dangerous sea, strait, or passage, situate to the eastward of a certain island called the Island of Banca, for the purpose of exploring the said sea, strait, or passage; and wrongfully, &c. without the knowledge, &c. kept and detained the said ship in the said voyage of observation and discovery for a great length of time; by reason whereof the ship, in the course of the said voyage, &c. was stranded, sunk, and wholly lost.

The plaintiffs proved that the East India Company wishing to establish a passage by the Straits eastward of the Island of

Banca, instead of the usual passage through the Straits of Banca, had given Captain Wilson, who had the command of the *Vansittart*, orders to take his passage to China that way, and to explore the coast as he passed. That in obedience to those orders the captain sailed on that voyage, and in the course of it the ship struck on a coral rock and was lost. On his cross examination, Captain Wilson said, that Mr. Lewin, the ship's husband, had retired from the cares of business, and that his son, who was also a plaintiff in this cause, transacted his business. That he had received his orders from the Company before he left England, and had communicated *them to Mr. Lewin, the son, who did not object to the voyage. [*320]

LORD KENYON:

The captain was bound to obey the orders given him by the Company. These orders were certainly not warranted by the terms of the charter-party, and therefore had the case rested on the orders, I should have thought that the plaintiffs had a right to maintain the present action. But the consent of Mr. Lewin, junior, who was agent of the ship's husband, entirely alters the case, for the ship proceeding from England without any objection from him, it must be taken that she sailed with his consent, and therefore proceeded at the risk of the owners. His lordship added, that had there been any collusion between the Company and one part owner, that would not have bound the others; but nothing of that kind appeared to have been intended in the present case.

The plaintiffs were nonsuited.

Erskine, *Bower*, and *Gibbs* for the plaintiffs.

Bearcroft and *Rous* for the defendants.†

† The plaintiffs afterwards brought another action in the Court of C. P., which was tried before Lord Eldon, C. J., at the sittings after Hilary Term, 1800, and were again nonsuited on the same ground. The terms of the charter-parties are now altered, and the ships are hired to be employed in trade and in warfare, and on any other service whatsoever. Abbot on Shipping, 281. And under this latter charter-party the Company are warranted in assisting and acting conjointly with his Majesty's

1794.

LEWIN v. EAST INDIA COMPANY.

[*321]

Government, at their requisition, in sending the chartered ships upon a warlike expedition against the King's enemies, under the *command of the King's officers placed on board the same. A ship of that description is still under the charter-party, though alterations were ordered to be made in her upper works by the Company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a King's officer assumed the command of her, and hoisted the King's broad pendant on board. *Dobree* v. *East India Company*, 11 East, 290.

CASES IN CROWN LAW.

[A FEW cases of general interest, belonging to the period of these reports, are here selected from Leach's "Cases in Crown Law." It is not, however, intended to include Leach's volumes in those covered by the present series.]

THE KING *v.* PEAR.*

1779.

(Leach, Cr. Ca. 212—214, Case 105.)

[212]

Obtaining a horse under the pretence of hiring it for a day, and immediately selling it, is felony, if the jury find the hiring was *animo furandi.*

THIS case was reserved by Mr. Justice ASHHURST, at the Old Bailey in September Session, 1779.

The prisoner was indicted for stealing a black horse, the property of Samuel Finch. It appeared in evidence that Samuel Finch was a livery-stable-keeper in the Borough; and that the prisoner, on the 2nd of July, 1779, hired the horse of him to go to Sutton, in the county of Surrey, and back again, saying on being asked where he lived, that he lodged at No. 25 in King Street, and should return about eight o'clock the same evening. He did not return; and it was proved that he had sold the horse on the very day he had hired it, to one William Hollist, in Smithfield Market; and that he had no lodging at the place to which he had given the prosecutor directions.

The learned JUDGE said:

There had been different opinions on the law of this class of cases; that the general doctrine then was that if a horse be let for a particular portion of time, and after that time is expired, the party hiring, instead of returning the horse to its owner, sell it and convert the money to his own use, it is felony, because there

* This case, though not strictly belonging to our period, is selected as the first of a series relating to felonious intent, several of which belong to this period.—R. C.

1779.
THE KING v. PEAP.
[*213]

is then no privity of contract subsisting between the parties; *that in the present case the horse was hired to take a journey into Surrey, and the prisoner sold him the same day, without taking any such journey; that there were also other circumstances which imported that at the time of the hiring the prisoner had it in intention to sell the horse, as his saying that he lodged at a place where in fact he was not known. He therefore left it with the jury to consider, Whether the prisoner meant at the time of the hiring to take such journey, but was afterwards tempted to sell the horse? for if so he must be acquitted; but that if they were of opinion that at the time of the hiring the journey was a mere pretence to get the horse into his possession, and he had no intention to take such journey but intended to sell the horse, they would find that fact specially for the opinion of the Judges.

The Jury found that the facts above stated were true; and also that the prisoner had hired the horse with a fraudulent view and intention of selling it immediately.

The question was referred to the Judges, Whether the delivery of the horse by the prosecutor to the prisoner, had so far changed the possession of the property, as to render the subsequent conversion of it a mere breach of trust, or whether the conversion was felonious?

The JUDGES differed greatly in opinion on this case; and delivered their opinions *seriatim* upon it at Lord Chief Justice De Gray's house on 4th February, 1780, and on the 22nd of the same month, Mr. Baron PERRYN delivered their opinion on it.† The majority of them thought, That the question, as to the original intention of the prisoner in hiring the horse, had been properly left to the jury; and as they had found, that his view in so doing was fraudulent, the parting with the property had not changed the nature of the possession, but that it remained [*214] unaltered in the prosecutor *at the time of the conversion; and that the prisoner was therefore guilty of felony.

† This judgment it seems was settled, and approved by several of the judges before it was delivered, and it is stated at large by Mr. East, 2 vol. 686—389.

JOHN RUSTON'S CASE.

1786.

(Leach, Cr. Ca. 408—409, Case 188.)

[408]

A witness, though deaf and dumb, may be sworn and give evidence on an indictment for felony, if intelligence can be conveyed to, and received from him by means of signs and tokens.

At the Old Bailey January Session, 1786, on the trial of William Bartlet for simple grand larceny, John Ruston, a man *mutus et surdus à nativitate*, was produced as a witness on the part of the Crown.

Martha Ruston, his sister, being examined on the *voir dire*, it appeared that she and her brother had been for a series of years enabled to understand each other by means of certain arbitrary signs and motions, which time and necessity had invented between them. She acknowledged that these signs and motions were not significant of letters, syllables, words, or sentences, but were expressive of general propositions, and entire conceptions of the mind; and that the subjects of their conversation had in general been confined to the domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of Christianity, and was certain *that she could communicate to him true notions of the moral [*409] and religious nature of an oath, and of the temporal dangers of perjury.

It was objected by the prisoner's counsel, that although these modes of conveying intelligence might be capable of impressing the mind with some simple ideas of the existence of a God, and of a future state of rewards and punishments, yet they were utterly incapable of communicating any perfect notions of the vast and complicated system of the Christian religion; and therefore the witness could not with propriety be sworn upon the Holy Gospels. The difficulty of arraigning a man for perjury whom the law presumes to be an idiot, and who is consequently incapable of being instructed in the nature of the proceedings against him, was also urged against the admissibility of the witness.

But the Court over-ruled the objection; and John Ruston

1786.

JOHN RUSTON'S CASE.

was sworn to depose "the truth," &c., and Martha Ruston "well and truly to interpret to John Ruston, a witness here produced in behalf of the King against William Bartlet, now a prisoner at the bar, the questions and demands made by the Court to the said John Ruston, and his answers made to them."

The prisoner was found guilty, and received sentence of transportation for seven years.

1786.

[409]

THE KING *v.* GEORGE CHARLEWOOD.

(Leach, Cr. Ca. 409—412, Case 189.)

To constitute larceny, the felonious intention must exist in the mind at the time the property is obtained; for if it be obtained by fair contract, and afterwards fraudulently converted, it is no felony. If, however, a fraudulent conversion take place after the privity of contract is determined, it is felony.

AT the Old Bailey in February Session, 1786, George Charlewood was indicted before Mr. Justice Gould, present Mr. Baron Perryn, for feloniously stealing, on the 4th day of October, 1785, a bay gelding, price five pounds, the property of John Houseman.

[*410] The prosecutor was a livery-stable keeper in Crown Street, *St. Ann's, Soho. On the 4th October, 1785, the prisoner, who was a post-boy, applied to him for a horse in the name of a Mr. Eley, saying, that there was a chaise going to Barnet, and that Mr. Eley wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse, and on going out of the stable-yard he met a friend of his, who asked him, where he was going? to which he replied, that he was going no further than Barnet. He accordingly proceeded towards Tottenham Court Road, which leads to Barnet, and also, though in some degree circuitously, to Mr. Eley's house. This transaction took place about nine o'clock in the morning, and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding to one Robert Sugden, at the "Black Horse," in

Leman Street, Goodman's Fields. The knees of the horse were terribly broke, one of them running blood, and the horse appeared to have been ridden very hard. The price for which the prisoner sold the horse, with the bridle and saddle included, was one guinea and a half: the purchaser almost immediately afterwards sold them to one Johnston for 2*l.* 15*s.*

The COURT to the jury:

The judges, in the case of one *Pear*,† under circumstances similar to the present, have determined, that if the jury be satisfied by the facts proved, that a person, at the time he obtains a horse, means to convert it to his own use, it is felony. But between the law of that case and the present, there is a distinction so nice, that it may seem to common understandings like splitting a hair. As this distinction, however, is adopted by the law, it is my duty to state it to you. If therefore you should think that the prisoner, at the time he came to hire the horse for the purpose of going to Barnet, really intended to go to Barnet, and proceeded, as it appears by the evidence he did, on his way to that place, it will certainly not be a felonious taking; for to constitute this species of felony, you must look to his intention at the very moment when he obtained the gelding: and therefore if he really intended to go to Barnet, but finding *himself in possession of the horse, afterwards hatched the idea of converting it to his own use instead of proceeding to the place to which the horse was hired to go, it will not amount to a felonious taking.‡ [*411]

† Page 703, *ante.*

‡ Elizabeth Leigh was indicted at Wells Assizes in the summer of 1800, for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment was on fire; and that his neighbours had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with having stolen, when the prosecutor's other neighbours were thus employed; and it appeared, that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor applying to her the next morning, she denied that she had any of the things belonging to him, whereupon he obtained a search-warrant and found his property in her house, most of the articles artfully concealed in various ways. But it was suggested that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken som

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There is, however, another point for your consideration; for although he really went to Barnet, yet he was obliged by the contract to deliver the gelding to the owner upon his return to London; and therefore, if you think that he performed the journey, and returned to London, and instead of delivering the gelding to the owner, converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over.

The jury found the prisoner guilty upon the first point—

That at the time he hired the horse he had an intention to steal it; and this finding bringing the case precisely within *the reason of the determination in the case of *The King* v. *Pear*, the Court thought the point too clear to save the case, and the prisoner received sentence accordingly.

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DAVID MILDRONE'S CASE.

(Leach, Cr. Ca. 412, Case 190.)

A Scotch covenanter may give evidence in a criminal prosecution, on being sworn according to the custom of his sect, without kissing the book.

At the Old Bailey in February Session, 1786, David Mildrone was produced as a witness on the trial of Christiana Fitzpatrick, for larceny. He stated to the Court that he was a North-Briton, and that the way of swearing in Scotland was not to kiss the book.

Mr. Justice Gould said, that on the trial of the rebels at Carlisle in the year 1745, finding it to be the ceremony of a particu-

of them in the presence, and under the view, of the prosecutor; and that therefore the case did not amount to felony. The jury, from the observations they received from the Court found her guilty; but said, that in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon a reference to the Judges in Michaelmas Term, 1800, all (absent Lawrence, J.) held the conviction wrong; for that if the original taking were not with intention to steal, the subsequent conversion was no felony, but a breach of trust.

lar sect, he admitted a witness to swear by the form of holding up his hand, without touching the book or kissing it; and that he afterwards referred the case to the opinion of the twelve Judges, who determined that the witness was legally sworn.

Upon the authority of this case David Mildrone was sworn by Thomas Shelton, Esq., Clerk of the Arraigns, in the following form:

"You swear, according to the custom of your country, and the religion you profess, that the evidence you shall give between our Sovereign Lord the King and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God." *

The prisoner was convicted.

THE KING *v.* JAMES GEORGE SEMPLE.

1786.

(Leach, Cr. Ca. 420—425, Case 196.)

[420]

Obtaining a post-chaise by hiring, with a felonious intent to convert it to the use of the hirer, is felony, although the contract of hiring was not for any definite time.

THE prisoner, J. G. Semple, was indicted for the stealing of a post-chaise, before Adair, Recorder, present Mr. Justice Gould.

The following facts appeared in evidence:—The prosecutor, [421] Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood under the name of Major Harrold, and had frequently hired chaises from the prosecutor, as the occasion required, and for which he had always paid with great punctuality. On the 1st of September, 1785, the prisoner hired a post-chaise of the prose-

* *Sed quære*, Whether the right form of swearing a Scotch covenanter is not as follows: "I, A. B. do swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the Court and the jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help me God." See *Mee* v. *Reid*, Peake's Nisi Prius, 23, and *Walker's* case, Old Bailey December Session, 1788. [See now Stringer on Oaths and Affirmations, Lond. 1890.—F. P.]

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cutor, saying, that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during the time that he kept the chaise; and a price of fifty guineas was talked about in case he should determine to purchase the chaise on his return to London, but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner fetched the chaise from Mr. Lycett's with his own horses; and it was in evidence, that he was driven in it from London to the "Crown and Cushion" at Uxbridge, where he ordered a pair of horses, and went from thence to the Duke of Portland's, and returned. He took fresh horses at the "Crown and Cushion," but where he went with the chaise afterwards did not appear. The fact was, he never returned it to Mr. Lycett; nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. Feltham, in Fleet Street, upon a suspicion of having, under false pretences, defrauded him of a quantity of ladies' hats.

Garrow for the prisoner submitted to the Court, that admitting the whole of the evidence to be true, the offence did not amount to felony; and he endeavoured to distinguish the case from that of *The King* v. *Pear* † and *Aickles*' case,‡ inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was not hired for any definite length of time, or to go to any certain place; and the mere understanding that it was for three weeks [*422] or a month, for the purpose of making a *tour round the North, made no part of the contract. He had hired it for such a length of time as he should please to keep it, at a certain stipulated price for each day; and it being delivered to him upon those terms, he had the entire possession of it in himself, and was answerable in damages for its detention, or for any injury which might happen to it during his absence. But supposing the contract should be thought not to extend beyond the three weeks or

† Page 703, *ante*. ‡ Leach, Cr. Ca. p. 294, Case 146.

a month, it is clear that during that time he had at least the legal possession; and then no intention to convert it wrongfully to his own use arising afterward, whether from necessity or dishonesty, will make the withholding it felony; for the *animus furandi* must exist at the time the property is obtained. In all the leading cases upon this subject of constructive felony, there has always been some evidence of a tortious conversion; but in this case it has not been proved that the prisoner has disposed of the chaise: it may be at this very moment in his possession, for anything that appears to the contrary, and a conversion cannot be inferred from his having neglected to return it.

The COURT:

The Court is bound by the determination of former cases. It is now settled, that the question of intention is for the consideration of the Jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's* case, and the other decisions which the Judges have made upon the subject of constructive felony. If there was a *bonâ fide* hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the *bonâ fide* contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it; and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful.† But, on the other hand, if the hiring was only a pretence made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case, the law supposes the possession ‡ *still to reside with the [*423] owner, though the property § itself is gone out of his hands, and then the subsequent conversion will be felony. The case of *The King* v. *Pear* was very solemnly debated at Lord Chief Justice De Grey's house; ‖ and the unanimous opinion of the Judges was at

† See *Charlewood's* case, p. 706, *ante*.

‡ *Sc.* property.

§ *Sc.* actual possession.

‖ Mr. Justice GOULD said he was one of the Judges who were present.

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last, That the direction given to the Jury by the learned Judge who tried the prisoner was right. The most important part of the argument turned upon the consideration, Whether the delivery of the horse to Pear had in law divested the owner either of his property or the possession of it? The question left with the jury was, Whether the contract was meant fairly? or, Whether it was a mere colour and pretence? The Jury found that it was a mere colour and pretence; and upon that finding, the Judges determined the taking to be felony; because it is an established principle of law, that the possession of property cannot be obtained through the medium of a fraud. But it has been attempted to distinguish the present case from *The King* v. *Pear*. —1st, That the hiring in this case was indefinite, but that in *The King* v. *Pear* it was certain, and limited. The time cannot be material in questions of this nature. Pear hired the horse in the morning, under pretence of going to Sutton in Surrey, and to return in the evening: but as the hiring was found to be felonious, the law of the case must have been the same, although it had appeared that the hiring was for two days, a week, a month, or any other given time; nay, if the time had been left entirely unlimited. The circumstance of the time being long or unsettled may indeed render the proof of guilt more difficult, but cannot alter the law of the case.—2ndly, It is said that this case differs from *The King* v. *Pear*, because it was proved, that Pear had sold the horse, and therefore had converted it to his own use; but that in the present case no proof has been given that the prisoner has sold or otherwise converted the chaise. Proof of actual conversion certainly is not necessary, but the Jury must judge of it from the circumstances of the case. If the prisoner, at any time before the prosecution was commenced, had offered to restore the chaise to the owner, or to pay him for it, such a [*424] conduct would have *been evidence of an honest intention when he originally hired it, and would have reprobated the idea of a fraudulent design. But he hires the chaise for a month, and a year passes, and neither the chaise nor the man are heard of until he is taken. There is no evidence even at this moment that the chaise is forthcoming, nor does anyone pretend to know where it is. This therefore raises a presumption against the

prisoner, which it is incumbent on him to repel; and if he cannot, it will be for the consideration of the Jury, under all the circumstances of the case, whether they think he has feloniously disposed of it, or otherwise converted it to his own use. In their determination of this point they must recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the re-delivery of the chaise formed any part of the contract, the non-delivery of it must necessarily form a part of their consideration. They will then consider whether the non-delivery is sufficient evidence to satisfy their consciences that he has converted it to his own use. These two considerations will naturally lead to a third, viz., Whether the property thus converted was originally obtained with a felonious design? which will carry them back to the instant of time that he obtained possession of it: and if they should find the original hiring was felonious, the most ingenious subtlety cannot distinguish this case from that of *The King* v. *Pear*. There is a case in Kelynge of a person who took a lodging in a house, and afterwards at night, while the people were at prayers, robbed them. The Jury found that the intention of taking the lodging was to commit the felony; and the Judges determined that this was burglary. There was also a case determined very lately by the Judges. A man ordered a pair of candlesticks from a silversmith to be sent to his lodgings. They were sent to his lodgings, with a bill of parcels; but he contrived to send the servant back, and to keep the goods; and this was held to be felony, although they were delivered with the bill of parcels, under an expectation of being paid the money; for the Jury found, that it was a pretence to purchase, with intention to steal.

The question of original intention was left with the Jury; and they [425]

Found the prisoner guilty.

A motion was made in arrest of judgment; but it was overruled, and he received sentence of transportation for seven years.

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THE KING *v.* JUSTIN HARVEY.

(Leach, Cr. Ca. 467—468, Case 215.)

If a horse be purchased, and delivered to the buyer, it is not felony, though he immediately ride away with it, without paying the purchase-money.

At Chelmsford Summer Assizes, 1787, for the county of Essex, Justin Harvey was indicted before Mr. Justice Gould, for that he, on the 9th September, 1785, one horse, of the price of 8*l.*, of the goods and chattels of Aaron Patrick, feloniously did steal, take, and carry away.

The prosecutor had sent his servant with the horse to Harlowbush fair, in order to sell it. The prisoner met the prosecutor, to whom he was personally known. "I hear," says the prisoner, "you have a horse to sell. I think he will suit my purpose; and if you will let me have him a bargain, I will buy him." The prisoner and the prosecutor walked together into the fair; and upon a view of the horse, the prosecutor said to the prisoner, "You shall have the horse for eight pounds;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately and pay him. The prosecutor replied, "Very well, very well." The prisoner rode away with the horse, and never returned.

The Court:

It is impossible by any construction whatsoever to make this case a felony. The case in "Kelynge's Reports," * where a man rides away with a horse which he had obtained on pretence of trying its paces, was a conditional delivery. *Major Semple's* case,† which is the most recent of the kind, and included in it a consideration of *The King* v. *Pear*,‡ was a delivery for a special purpose, or rather a contract of unlimited duration. But in the present case the delivery was unconditional, and the contract was completed. It was a sale; and the property as well as the possession was entirely parted with. The prisoner has

* Kely. 82.

† Page 709, *ante*.

‡ Page 703, *ante*.

defrauded the prosecutor of the price of the horse, but not of the horse itself; and the only remedy the prosecutor has is by action to recover *the eight pounds; but the prisoner cannot be indicted for a felony.

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And the prisoner was accordingly discharged.†

THE KING *v.* WILLIAM HOWE.

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(Leach, Cr. Ca. 481—483, Case 222.)

In what manner statutes of the same session prior to the Act 33 Geo. III. c. 13 (8th April, 1793), are to be read together.

AT the Old Bailey in January Session, 1788, William Howe was convicted before Mr. Justice Wilson, present Lord Chief Baron Eyre, on the statute 6 George III. c. 36, for spoiling and destroying, in the night-time, five shrubs called sweet bay-trees, of the value of five shillings, growing in an inclosed ground belonging to Robert Palethorp.

A doubt arose, Whether the Statute 6 Geo. III. c. 36, which makes the offence felony, punishable with transportation for seven years, was not virtually repealed by the Statute of 6 Geo. III. c. 48, s. 3, which makes the offender liable to pecuniary penalties only, on his first and second conviction. *Upon this [*482] doubt the judgment was respited, and the case referred to the consideration of the twelve Judges.

The Statute of 6 Geo. III. c. 36, enacts, "That all and every person and persons who shall in the night-time pluck up, break, spoil, or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of five shillings, and which shall be growing, standing, or being, in the garden-ground, nursery-ground, or other inclosed ground, of any person or persons

† Wherever there is a real and *bonâ fide* contract and a delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bonâ fide* contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony. Per ASHHURST, J., in *Rex* v. *Pear*.

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whomsoever, shall be deemed and construed to be guilty of felony, and the Court have authority to transport such offenders for seven years."

The statute of 6 Geo. III. c. 48, s. 3, enacts, "That all and every person who shall pluck up, or cut, spoil, or destroy, or take or carry away, any root, shrub, or plant, roots, shrubs, or plants, out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person or persons whomsoever, without the consent of the owner or owners thereof first had and obtained, and shall be thereof convicted on the oath of one or more witness or witnesses, before one or more Justice or Justices of the Peace for the county or place where the offence shall have been committed, shall for the first offence forfeit any sum not exceeding forty shillings, &c. together with the charges previous to and attending such conviction.—And if any persons so convicted shall again commit the like offence, and shall be thereof convicted in manner aforesaid, such person and persons shall forfeit for such second offence any sum not exceeding five pounds, &c. together with the costs and charges, &c.—And if any person so before convicted shall a third time commit the like offence, and shall be thereof convicted, such person for such third offence shall be deemed guilty of felony; and the Court hath authority to transport such person for the space of seven years."

Mr. Baron THOMPSON, in the February Session following, delivered the opinion of the Judges:

At a meeting of the Judges, from which only one was absent, this case was taken into consideration; and they are unanimously of opinion, That the statute of 6 Geo. III. c. 36, upon [*483] which the *indictment is founded, is not repealed by the statute of 6 Geo. III. c. 48, s. 3. The first statute applies only to the offence of stealing or destroying shrubs of the value of five shillings in the night-time, and does not at all extend to the stealing or destroying shrubs in the day-time, be their value to what amount it may. The second statute was passed during the same session of Parliament as the first statute, and it recites the practice which prevailed of stealing and destroying roots, shrubs,

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and plants, many of which, says the preamble, are of great value: and to protect this species of property both by day and by night, this Act was made. The order in which the chapters of the statute-book is arranged is mere accident, and depends on the will of the clerks in Parliament; and as these statutes were passed in the same Session,* they are to be considered in *pari materiâ*, as composing one system of law, and when taken together their provisions will stand thus: If the property taken or destroyed be of the value of five shillings, and the offence be committed in the night-time, the offender may be prosecuted for the felony under the 6 Geo. III. c. 36. If the property be under the value of five shillings, and taken or destroyed by night or by day; or being above the value of five shillings, and under forty shillings, is taken or destroyed in the day-time; the offender can only be punished by the penalties inflicted by 6 Geo. III. c. 48, s. 3. The Judges therefore are all of opinion, That the prisoner was properly convicted upon the first-mentioned statute.

The prisoner was fined one shilling and imprisoned six months.

WILLIAM WALKER'S CASE.

1788.

(Leach, Cr. Ca. 498, Case 229.)

[498]

A Scotch covenanter may be sworn in as a juryman in a Court of Criminal Law, by the ceremony of holding up his hand, without kissing the book.

AT the Old Bailey in December Session, 1788, present Mr. Justice Wilson, and Mr. Recorder, William Walker, one of the Second Middlesex Jury, being, as he stated, a member of the Kirk of Scotland, objected to be sworn by the usual ceremony of kissing the book, but offered to take the oath, according to the ceremony of his own religion, by holding up his hand.

* But Mr. Justice BULLER was of opinion, that if these two statutes had been made in different Sessions, the last would have been a virtual repeal of the former. 2 East, C. L. 589.

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The COURT said, there was no objection to his being admitted to take the oath in this form, and he was so sworn accordingly.†

THE KING *v.* JOHN WILKINS.

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(Leach, Cr. Ca. 520—526, Case 236.)

To obtain goods by false pretences from the servant of the owner, to whom they were delivered, for the purpose of being carried to a customer who had purchased them, is a taking from the possession of the master; and, if so taken, with a preconceived design to steal them, amounts to felony.

AT the Old Bailey April Session, 1789, John Wilkins was indicted for stealing thirty-six pairs of silk stockings, and twelve pairs of thread stockings, the property of William Wayte. The Jury found the following facts, and the case was reserved for the opinion of the twelve Judges.

Case. The prosecutor Mr. Wayte was a hatter and hosier in Panton Street, in the Haymarket. On the 9th February preceding the trial, he delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. Heath, a hosier in Milk Street, Cheapside. As the apprentice was going up Ludgate Hill, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going? to which the apprentice answered, "To Mr. Heath's." The prisoner, producing a small parcel, replied, "I know your master, and I owe him for those parcels. I was going for them to your shop; therefore do you give me your parcels and take this back to your master. There is a letter inside, and it must be immediately forwarded to Mr. Brown." The apprentice accordingly consented to the proposed exchange, and delivered the two parcels for Mr. Heath to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner having effected this exchange, endeavoured to separate himself from the apprentice; but his *manner [*521] created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him

† *Vide Mildrone's* case, p. 708, *ante*.

if he was the Mr. Heath to whose house he was conveying the parcels? The prisoner replied that he was Mr. Heath; and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value; and he was not the Mr. Heath he pretended to be.

The Jury were of opinion, that the prisoner, by falsely pretending that he was going to the house of the prosecutor for Mr. Heath's parcels, had contrived to make this exchange of parcels, with an intent wrongfully to obtain and convert to his own use the goods mentioned in the indictment; and therefore they found him guilty. The Court, however, being doubtful whether, under all the circumstances, the crime amounted to felony, the judgment was respited, and his case referred to the consideration of the twelve Judges.

Mr. Justice GOULD, on the first day of February Session, 1790, ordered the prisoner to be put to the bar, and delivered the opinion of the Judges to the following effect:

The circumstances which appeared in evidence upon the trial of this indictment form a kind of case upon which a variety of opinions have been entertained, whether it amounts to felony or fraud; and the learned Recorder, before whom the prisoner was tried, very properly referred it to the consideration of the Judges, in order that the point might be deliberately settled. On the first day of Hilary Term, 1790, ten of the twelve Judges assembled to consider of this case, and they were unanimously of opinion, that the conviction is right. The observations which were made in support of that opinion, as far as they occur to me, I shall now state; and if my learned brothers † who are now on the bench, and who were both of them present when this unanimous opinion was given, should think that I carry this matter too far, they will give such explanation as may strike their minds. No case exactly like the present in point of fact has, I think, ever before arisen; but the principle on which it depends has been long known, and frequently recognised, *viz., That to constitute [*522] the crime of larceny the property must be feloniously taken from

† Mr Justice GROSE, and Mr. Baron THOMPSON.

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the possession of the owner. The decision of this question therefore turns upon the consideration whether, at the time the prisoner obtained these goods from the actual possession of the apprentice, they were not, in contemplation of law, in the constructive possession of the master. 1st, It seems to me to be clearly settled, that the possession of personal chattels follows the right of property in them: thus, in the case of *Hudson* v. *Hudson*,† the plaintiff, as an executor, brought an action of trover, and declared that the testator was possessed of certain goods mentioned in the declaration; and that after his death they came to the hands of the defendant, who had converted them to his own use. The defendant was found guilty; and it was moved in arrest of judgment, that it did not appear that these goods ever were in the possession of the plaintiff, but on the contrary, that after the testator's death they were in the hands of the defendant. But Lord Chief Justice HYDE and the rest of the Court ‡ unanimously gave judgment for the plaintiff, because although it was not alleged that he was actually possessed of these goods, yet upon the matter disclosed by the declaration, the law said that he was possessed; for the right of property draws with it the actual possession of goods, so as to entitle the owners of them to trespass: as if a man in London give me his goods which are at York, and a third person take these goods away, I may maintain an action against him for a trespass. It appears therefore from this case to have been the solemn opinion of Judges of high character and reputation, that the possession in the case of personal chattels follows the property; and to this opinion I entirely subscribe. 2ndly, It is a rule of law equally well known and established, that the possession of the true owner cannot be divested by a tortious taking; and therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because [*523] these acts of theft do not change the possession of *the true owner.§ 3rdly, These doctrines will also, in my opinion, hold where the

† Latch. 214.

‡ DODERIDGE, JONES, and WHITLOCKE.

§ See note at end of case.—F. P.

goods are taken from the possession of the true owner by means of fraud; for otherwise a man might derive an advantage from his own wrong. Various opinions formerly prevailed whether servants, having the custody of their masters' goods, were guilty of felony by fraudulently embezzling them, and converting them to their own use; but the statute 21 Hen. VIII. c. 7, which makes this offence felony, does not say that it was not felony before by the common law, but only recites that the matter had been doubted; and this Act of Parliament did not, in my judgment, mean to weaken, but to assist the common law. Ever since this Act therefore, the opinion of those who before the Act held that servants embezzling their masters' property was felony, has been confirmed. Thus in the case of a butler, or other servant, to whose care a master entrusts his plate or other goods, it has uniformly been held, that such servants are guilty of felony by embezzling such plate or goods, or taking them fraudulently away: and this doctrine is not confined to menial servants only; for it appears both by Hale and Hawkins, that if a shepherd, who has the care of sheep, and who, from the nature of his employment, must be constantly in the pastures, take away any part of the flock with intent to steal it, he is guilty of felony, although in both cases the plate is actually delivered to the butler, and the sheep to the shepherd, for the possession still remains in the master. And this law prevails in all cases where servants have not the absolute dominion over the property, but are only entrusted with the care or custody of it for a particular purpose. Very soon after I had the honour of sitting on the bench, the case of *The King* v. *Paradise*† came before me at the Lent Assizes for Salisbury, 1766. The prisoner was foreman to Mr. William Perriam a mercer at the Devizes, and he also kept his books in the capacity of book-keeper on a yearly salary, and paid and received money for him as keeper of his cash accounts, but he did not live in his master's house, but went there every day to transact his business. Mr. Perriam had delivered bills to him to the amount of 1,500*l.* with *directions to inclose them in different [*524] covers, and send them by that day's post to his correspondent in London, as cash to be carried to the credit of Mr. Perriam's

† 2 East, 565, 567.

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account; but instead of so doing he secreted them to his own use, changed one of them at Salisbury, which bill was indorsed both by Mr. Perriam and the prisoner, and the next day, being Sunday, under pretence of visiting some relations in the neighbourhood, ran off with them, but was apprehended with part of the bills in his custody at Topham in Devonshire in his way to France. The late Lord Ashburton, then Mr. Dunning, and some other gentlemen of eminence at the bar, were counsel for this man on his trial; and they contended, that as the prosecutor had delivered these bills to the prisoner, he had thereby parted with the possession of the property, and therefore the prisoner could not be guilty of felony in taking them away; and he resembled it to the case of a carrier, who is intrusted to carry goods, but to which I thought it bore no resemblance; for my idea was, that the possession of the master had not in any way been changed, and that it was just the same as if he had stolen the bills out of his master's desk. The jury found the prisoner guilty; but at the request of his counsel, I reserved the case, and the Judges unanimously concurred in the opinion I had given, that the possession of this bill still continued in Mr. Perriam. In Michaelmas Term, 1782, one William Bass † (and I have the case here) was indicted for stealing a quantity of goods to the value of eighty pounds, the property of one John Gatfee. The prisoner was porter in the general employ of the prosecutor. The prosecutor had delivered the parcel containing the goods mentioned in the indictment to the prisoner, to be carried to a customer; but in his way to the place where the customer lived, he met two men, who prevailed with him to go into a public-house and to dispose of the goods; which they accordingly did, and the prisoner received eight guineas as his share of the produce. The question was, Whether this amounted to a felonious taking? It appears from a note at the end of the case, that the goods were taken out of a sack by the two men, [*525] delivered to the *prisoner, and put by him into a brown bag; and therefore from these last circumstances, this case furnished a colour for the distinction that has been taken in the case of a carrier, viz., If a carrier run away with the whole bale intrusted

† See *Rex* v. *Bass*, Leach Cr. Ca. p. 251. Case 125.

to his care, he is not guilty of felony; but if he open it, and take away part of its contents, then he will be guilty of felony.† The case of a carrier is of a peculiar nature; for by the engagement which he enters into to carry them, he acquires a sort of special property in the goods; he is in all cases whatever liable to a civil action for the loss of them, except that loss happen from public commotions, or the act of God; but on the consideration of this case the Judges did not think that even these circumstances made any material difference; and my manuscript, which I put down the same evening, on my return from Lord Mansfield's chambers, is, that the Judges were unanimously of opinion that Bass had been legally convicted, for that the prisoner being a servant, and the goods being delivered to him to carry to a customer, the possession of the goods still remained in the master.‡ In the same manuscript I perceive that I have noticed *Paradise's* case as having been decided upon the same principle; and the accuracy of this manuscript is confirmed by a note which I have seen of *Bass's* case taken by Mr. Justice Buller, which exactly corresponds with mine, except only this addition, "that the prosecutor had a power to countermand the delivery of these goods to the customer;" and there cannot be a stronger argument used to prove that the possession continued unaltered in the master. Now, to apply the principle of these two determinations to the circumstances of the present case, it appears to me, that the prisoner having obtained these goods fraudulently from the apprentice, is just the same as if he had obtained them from the actual possession of the master; and is just the same thing as if he had gone into the prosecutor's shop, and taken them from the counter, or from his window, and immediately run *away with [*526] them. There is in Sir Thomas Raymond's Reports § the case of one Abraham Chiffers, who went into the shop of Ann Chatteris, and asked to see two laced cravats; which she shewed to him, and delivered them into his hands, and thereupon he asked the price of them; to which she answered, seven shillings; he said

† 1 Hale, 504; 1 Hawk. ch. 33, sect. 5, 7; 3 Inst. 107; Staunf. 25; 1 Bacon's Abr. 557; 4 Bl. Com. 30.

‡ That was the ground of the determination as appears from Mr. Justice Buller's manuscript.

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he would give her three shillings, and immediately ran out of the shop, and took the goods away with him, openly in her sight. The question was, Whether this was felony? And Sir THOMAS RAYMOND was of opinion that it was felony, and exactly the same as if he had snatched it from the counter, and run away with it. The more recent case of *Rex* v. *Pear* * is in point. Pear went into Smithfield, and chaffering for a horse, at last desired that he might be permitted to try its paces; and when the owner delivered the horse to him for this purpose, he mounted, and clapping his spurs to its sides rode away with it. Now the circumstances of the present case are much stronger than those in *Pear's* case; yet that was held to be felony; † and many other cases of obtaining goods under false pretences, with a preconceived design to steal them, have been held to be felony. The taking from the hands of the apprentice, is a taking from the possession of the master; and the artful contrivance made use of is evidence of the intention with which they were so taken. The jury have found that the intention was felonious; and therefore I concur, upon these reasons, in the opinion which the Judges have delivered in this case, that the conviction is right, and the verdict of guilty must stand as it is recorded.

The prisoner accordingly received sentence at the end of the Session, to be transported for the term of seven years, to commence from the time of his conviction.

Note.—The statement on p. 720: "It is a rule of law equally well known and established, that the possession of the true owner cannot be divested by a tortious taking," &c. is of doubtful authority even if we read *possession* as = *right to possess.* See Mr. Justice Wright's criticism in Pollock & Wright on Possession, p. 152.—F. P.

* P. 703, *ante.*

† *Sed vide Cockwaine's* case, Leach, Cr. Ca. p. 498. Case 230.

IN THE HOUSE OF LORDS.

JOHN JAMIESON & CO., APPELLANTS.
JAMES LAURIE, RESPONDENT.

1796. *Nov.* 7.

[474]

(6 Bro. P. C. 474—486.)

Demurrage ceases on the day of sailing [or readiness to sail]* from the port of lading; and if a ship afterwards puts back by reason of contrary winds and is detained (by frost for example), the freighter is not liable.

THE question in this cause arose from a claim for freight, demurrage, and damages, on account of a voyage from Leith to St. Petersburgh, performed by the ship *Bell*, freighted by the appellants, and belonging to the respondent. [The appeal was from the Scottish Court of Session.]

[The *Bell* arrived at Cronstadt in October, 1787, and loaded a cargo of tallow.] After the *Bell* was cleared out, she set sail [476] from Cronstadt; but, after being at sea several days, she returned to that port, having met with contrary winds (as Anderson [her master] and several of the ship's company afterwards deponed in this action): after which the frost setting in that season much earlier than usual, she was frozen up for the winter, and was thereby detained till the month of May, 1788, so that she did not arrive *at Leith till the beginning of June [*477] thereafter. A number of vessels which were cleared out from Cronstadt after the 16th of October O.S., one upon the 17th and several upon the 25th and 26th of that month, arrived in safety at their destined ports.

By the wintering of the *Bell* at Cronstadt the appellants suffered a very heavy loss on the cargo, to the amount of no less than 1,200*l.* sterling. But independent of this, the respondent brought a claim against the appellants for demurrage during the whole time the ship lay at Cronstadt; not only till the day the

* See *Pringle* v. *Mollett* (1840) 6 M. & W. 80.—F. P.

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cargo was put on board and she was furnished with her passes, but for the whole period that she afterwards remained at Cronstadt after she had set sail from that port, and had put back by contrary winds, being at the rate of 3*l.* per diem for the time the vessel was detained after the 1st of September till her arrival in the port of Leith.

[Evidence was taken in London of the custom of merchants in
[482] respect of demurrage. The Lord Ordinary] on the 11th December, 1792, pronounced the following interlocutor: "Having considered this representation, with answers, in respect of the depositions of sundry merchants and shipmasters, who give it as their opinion, that the demurrage of a ship ceases on the day of her sailing from the port of her loading, and that if a ship should thereafter be put back by contrary winds, and detained by the frost setting in, the same is considered as a *casus fortuitus* that must affect the owners, and that no opinions to the contrary appear from the proof; alters the former interlocutor, and finds that the charge is not entitled to demurrage after the 29th of October, 1787; and appoints parties to be ready to debate on the extent of the damage or demurrage, claimable upon the suspenders on account of the detention prior to that period."

This interlocutor [was reversed by the full Court] on the 16th of January, 1794.

[The appellants submitted in the House of Lords (*inter alia*)
[484] that] if the shipmaster thought proper to remain after the expiration of the time limited in his letter of instructions, he could only claim demurrage, according to the custom of merchants in similar cases. "And the appellants do humbly contend, that the witnesses adduced by them do clearly and irrefragably establish the law and the practice of merchants to be, that demurrage ceases, either from the day that the ship is cleared and ready for sailing, or, at least, that when a ship has once sailed, all claim for demurrage is totally at an end; and this without distinction, however the detention of the vessel may have been occasioned. In the case in question, the vessel did actually sail from Cronstadt on the homeward voyage; and the appellants contend, therefore, that the demurrage should cease either from the day on which the vessel had received the

necessary passes, and was cleared out and ready to sail, or from the day on which she actually did sail." * * *

It was ordered and adjudged, That the several interlocutors complained of, be reversed: And it was further ordered and adjudged, That the interlocutor of the lord ordinary of the 11th of December, 1792, be affirmed: And it was further ordered, That the cause should be remitted back to the Court of Session in Scotland, to proceed according to the said interlocutor of 11th of December, 1792.

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Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts.

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authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable.

But clearly if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill, or of ratification of the act of acceptance, without resorting to the letter of attorney. *Howard* v. *Baillie*, *Gardner* v. *Baillie* 531

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BOND—1. **Non-acceptance.**—Where a bond is made, with a condition to be void if something is done which, in the event turns out impracticable, the condition is not satisfied by doing what is practicable towards the end intended.

Therefore where a bill was drawn by A. in England on B. at Bombay, payable sixty days after sight, and a bond given to C. (the indorsee), with condition to be void if the bill should be paid at Bombay, or paid here by the obligor within thirty days after the bill should be produced to him after being sent back here protested for non-payment, and before the bill arrived at Bombay the drawee had left that place, and his agent refused to accept it when it did arrive; it was held that the bond was not forfeited by the obligor refusing to accept the bill thirty days after it was returned to England protested for non-acceptance. *Campbell* v. *French* 154

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CHURCHWARDEN—1. **Election.**—On an issue whether a churchwarden ought to be elected by the select vestry, a record between a former churchwarden and another person is admissible evidence.

If in pleading, it is stated, "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number.

So if it had been stated that the vestry was composed of a certain select number of persons *comme semble*. A select vestry cannot be constituted by a faculty from the Bishop. *Berry* v. *Banner* 674

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—— 5. **Notice of special terms.** *See* **Lien.**

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—— 2. The Court will not grant a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; but the proper remedy in case of his refusal to obey such order is by indictment. *Rex* v. *W. Bristow* 144

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—— 2. **Conversion of hired property to use of hirer.**—Obtaining a post-chaise by hiring, with a felonious intent to convert it to the use of the hirer, is felony, although the contract of hiring was not for any definite time. S. C. 2 East, 601. *Rex* v. *Semple* 709

—— 3. **Embezzlement by servant—Liability of master.**—If when a master gave his servant money to buy meat for the use of the family, the servant, instead of paying ready money order the meat on credit and embezzle the money, the master is not liable. *Stubbing* v. *Heintz* . . 651

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In stating such a crime in an indictment, it is not necessary to set forth that the defendant knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purposes they agreed to certify the fact as true, without knowing that it was so. *Rex* v. *Mawbey* 282

—— 8. **False imprisonment.**—If A. having been robbed suspect B. to be guilty, and take him and deliver him into the charge of a constable present, B. (if innocent) may maintain trespass against A. *Stonehouse* v. *Elliott* 183

—— 9. **High treason.**—Indictment for high treason in compassing the King's death and adhering to his enemies. Overt act, conspiring with others to send intelligence to the enemy concerning the disposition of the King's subjects in case of an invasion.

A letter sent by one of the conspirators in pursuance of the common design with a view of reaching the enemy, evidence against all engaged in the same conspiracy.

A paper found in the possession of one of the conspirators containing intelligence proved to have been collected by the prisoner, which paper was in the handwriting of the prisoner's clerk, evidence against the prisoner: *aliter* of a paper in the same handwriting not appearing to have any connection with the prisoner.

Any intelligence sent to the enemy in order to serve them in shaping their attack or defence though the purport of it may be to dissuade them from an invasion is high treason.

One disturbing the Court fined.

Power of the Court to adjourn in criminal cases where necessary for the ends of justice.

Description of jurors. *Rex* v. *Stone* 253

—— 10. **Indictment.**—If a defendant, who had been convicted of an indictment in an inferior jurisdiction, remove the record here by *certiorari* between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, this Court will send the record back by *procedendo*, without going into the objections to the indictment. If the defendant wish to take the opinion of this Court on the sufficiency of such an indictment, he must move the record here by writ of error after judgment below. *Rex* v. *Jackson* 138

—— 11. **Larceny.**—Obtaining a horse under the pretence of hiring it for a day, and immediately selling it, is felony, if the jury find the hiring was *animo furandi*. *Rex* v. *Pear* 703

—— 12. **Larceny.**—If a horse be purchased, and delivered to the buyer, it is not felony, though he immediately ride away with it, without paying the purchase-money. *Rex* v. *Harvey* 714

—— 13. **Larceny by false pretences.**—To obtain goods by false pretences from the servant of the owner, to whom they were delivered, for the purpose of being carried to a customer who had purchased them, is a taking from the possession of the master; and, if so taken, with a preconceived design to steal them, amounts to felony. *Rex* v. *Wilkins* 718

—— 14. **Larceny.**—To constitute larceny, the felonious intention must exist in the mind at the time the property is obtained; for if it be obtained by fair contract, and afterwards fraudulently converted, it is no felony. If, however, a fraudulent conversion take place after the privity of contract is determined, it is felony. *Rex* v. *Charlewood* 706

CRIMINAL LAW.—15. **Perjury.**—Though to support an indictment for perjury committed on a former trial the prosecutor must in general prove the whole of the defendant's examination, yet when the perjury was committed in swearing to a fact not connected with the general merits of the cause, proof of the cross examination only is sufficient. *Rex* v. *Dowlin* 679

CUSTOM.—1. A custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A. at all seasonable times of the year, at their free will and pleasure," is good. But a similar custom, "for all persons for the time being, being in the said parish," is bad. *Fitch* v. *Rawling* 425

—— 2. By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley* v. *Wintringham* 670

DEBT. *See* **Consideration**; **Guaranty**; *and* **Will**, 6.

DEED—1. **Presumption of due execution.**—If the defendant's handwriting to a deed is proved, the jury may presume the sealing and delivery. *Grellier* v. *Neale* 669

—— 2. **Deposit of.** *See* **Mortgage**, 1, 2.

DISTRESS.—A horse cannot be distrained damage-feasant if there be a rider upon him. *Storey* v. *Robinson* 137

ELECTION. *See* **Married Woman**, 1; *and* **Will**, 21.

EMBEZZLEMENT. *See* **Criminal Law**, 3.

EQUITY. *See* **Jurisdiction.**

ESTATE-TAIL.—A limitation in a deed, to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue, to the second, third, and other sons of A., and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of A. *Owen* v. *Smyth* 513

EVIDENCE.—1. Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the state of the balance generally, without producing them. *Roberts* v. *Doxon* 660

—— 2. On a replication that A. was not married to B. proof that A. was married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the issue.

The English Courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country.

A Jewess may be permitted to give parol evidence of her own divorce in a foreign country according to the custom of the Jews there. *Ganer* v. *Lady Lanesborough* 647

—— 3. **Evidence of title.**—A book found in the herald's office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact.

Where a title to tithes in a layman is clearly made out, though not supported by possession, the Court will decree an account without an issue. *Lygon* v. *Strutt* 631

EVIDENCE—4. **Of deaf and dumb witness.** *See* **Criminal Law**, 4.
And see **Practice**, 9—13.

EXECUTION—1. **Levari facias.**—Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it from time to time after it is returnable till the sum indorsed be satisfied, yet if it be actually returned, the authority of the Bishop is at an end. Therefore where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the return day, the Court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was actually returned. The proper way to proceed is to rule the Bishop from time to time to know what he has levied. *Marsh* v. *Fawcett* . . 510
—— 2. **Of deed.** *See* **Deed**, 1.

EXECUTOR—1. **Liability.**—A co-executor, who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate, and sending it immediately to the acting executor. *Balchen* v. *Scott* . 29
—— 2. **Refusing to act.**—Cannot take a legacy to him as executor. *Abbot* v. *Massie* 79
And see **Bill of Exchange**, 1, 2; **Practice**, 14; *and* **Will**, 20.

FARM. *See* **Will**, 18.

FISHERY.—Declaration for fishing in plaintiffs' several fishery in Orford Haven.
Plea, averred *locus in quo* to be an arm of the sea, in which all have a right to fish.
Replication averring exclusive right of fishery by prescription traverses the general right. Rejoinder traversing the prescriptive right of the plaintiffs. Demurrer thereto.
The rejoinder is good: for the traverse in the replication was bad, and the defendant might pass it by. *Richardson* v. *The Mayor of Orford* . .. 579

FRAUDS—Statute of. *See* **Guaranty.**

GAOL—Liability to repair.—The lord of a franchise is not, as such, bound to repair a gaol within it; but he may be subject to such charge by immemorial usage. *Rex* v. *The Earl of Exeter* 207

GOODS—Sale of. *See* **Sale of Goods.**

GUARANTY.—A promise to pay the debt of another need not be proved to be in writing when the defendant pleads a tender to the count on such promise. *Middleton* v. *Brewer* 643

HALF-PAY. *See* **Officer.**

HIGHWAY—Repair.—A certificate by justices of the peace that a highway (indicted) is in repair is a legal instrument recognised by the courts of law, and admissible in evidence after conviction when the Court are about to impose a fine.
And consequently it is illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the Court.
In stating such a crime in an indictment, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purposes they agreed to certify the fact as true, without knowing that it was so. *Rex* v. *Mawbey* 282

HUSBAND and WIFE—1. **Adultery of wife.**—In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action, and not merely to mitigate the damages. *Hodges* v. *Windham* 649

—— 2. **Harbouring wife of another.**—No action lies for harbouring the plaintiff's wife where she is kept by the defendant from a principle of humanity, to secure her from the ill-treatment of her husband. *Philp* v. *Squire* 659

—— 3. **Maintenance.**—Held that a husband was not bound to receive or to support his wife after she had committed adultery, though he had before committed adultery himself and turned her out of doors, without any imputation of her conduct. *Govier* v. *Hancock* 271

INFANT—1. **Necessaries.**—An action does not lie against an infant for necessaries, if it appears at the time that he was sufficiently provided. If the plaintiff omits inquiry, it is at his peril. *Ford* v. *Fothergill* . . 695

—— 2. **Voidable contract.**—A contract by an infant is voidable and not void, and where the contract may be for his benefit a third person cannot excuse his own tortious act towards the other contracting party by alleging that the contract is void. *Keane* v. *Boycott* 494

INJUNCTION—Conduct of trustees for sale.—On a trust to sell, a suggestion in the bill of improper conduct of the trustees in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. *Pechel* v. *Fowler* 627

INTEREST. *See* **Mortgage**, 3.

INTERPRETER—Obligation of secrecy.—An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed is at an end. *Du Barré* v. *Livette* 655

INSURANCE (FIRE)—Condition in policy.—If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy.—By the proposals of the Phœnix Company it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens and some reputable householders of the parish, importing that they knew the character, &c., of the assured, and believe that he really sustained the loss and without fraud:" held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate. *Worsley* v. *Wood* . . 323

—— (**Marine**) 1. **Alien.**—No action can be maintained either by, or in favour of, an alien enemy. Therefore a plea of alienage, to an action on a policy of insurance brought in the name of an English agent for his principal an alien, such interest appearing on the record, is a good plea; and a replication to such a plea that the alien is indebted to the agent (the plaintiff) in more money than the value of the property insured cannot be supported. *Brandon* v. *Nesbitt* 109

—— 2. **Capture of ship by enemy.**—If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture and not by the perils of the seas. *Green* v. *Elmslie* 693

—— 3. **Commencement of policy.**—Where a ship was chartered from L. to T., there to take on board a certain number of pipes of wine and proceed to B., &c., for which the owner was to receive freight at the rate of so much per pipe, a policy of insurance on such freight was held to attach from the sailing of the ship from L. *Thompson* v. *Taylor* 233

INSURANCE (MARINE)—4. **Continuance of risk.**—If a policy be on a ship bound to a foreign port until she is twenty-four hours moored in safety there; and previous to such ship's arrival at her destined port an embargo is laid on all English vessels in that port, and she on entering it is also detained, and her crew made prisoners of war, the assured is entitled to recover. *Minett* v. *Anderson* 692

—— 5. **Goods in unnamed ship.**—A policy of insurance on goods "by a ship or ships as interest shall appear" is legal; and the insurer under such a policy will be bound by an appropriation of the insurance to a particular ship made by the assured alone (provided he does so in good faith and consistently with his original intention in making the policy).

An intention to deviate from a voyage once begun has no effect until something is voluntarily done in pursuance of that intention, whereby the risk is actually changed. *Kewley* v. *Ryan*, *Henchman* v. *Offley* . . 408, 413

—— 6. **Deviation in voyage.**—If the voyage described in a policy be "from A. to B. and C.," and the ship go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any subsequent loss, if it be not the regular and settled course of the voyage to go to C. first. And *Qu.* whether such a regular and settled course of voyage will control such a policy? *Beatson* v. *Haworth* . . . 258

—— 7. **Restraint of princes—Embargo.**—A policy of assurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c., extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the assured may abandon and recover as for a total loss. *Rotch* v. *Edie* 222

—— 8. **Letter of marque.**—The assured upon a trading voyage taking out a letter of marque [but without a certificate which is necessary to its validity] unknown to the underwriters solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. And if the captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel is afterwards lost in consequence of it, it is an act of barratry, upon which the assured may recover against the underwriters, although the captain libelled the prize for the benefit of his owner as well as himself. *Moss* v. *Byrom* 208

—— 9. **Warranty in policy—Convoy.**—A policy of insurance is effected on a ship, on a voyage from A. to C. warranted to depart with convoy for the voyage. The convoy appointed is to B., a port in the course and near to C. This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from B. to C. The term convoy, in a policy, means such a convoy as shall be appointed by Government. *D'Eguino* v. *Bewicke* 503

JUDGMENT.—**Res judicata—Distinct cause of action.**—Plaintiff in a former action declared on a promissory note, and for goods sold, but upon executing a writ of inquiry after judgment by default gave no evidence on the count for goods sold, and took his damages for the amount of the promissory note only. Ruled that the judgment thereupon is no bar to his recovering in a subsequent action for the goods sold. *Seddon* v. *Tutop* . . 274

JURISDICTION.—This Court having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was upon the circumstances held only a security for the debt, the expenses of the proceeding and incumbrances paid by him with interest; and subject thereto a reconveyance was decreed. *Lord Cranstown* v. *Johnston* 80

JUSTICE OF THE PEACE—Warrant of. *See* **Bastardy**; *and* **Magistrate.**

LANDLORD AND TENANT—1. **Covenant.**—A covenant in a lease that the lessee, his executors and administrators, shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named. *Tatem* v. *Chaplin* 360

—— 2. A covenant for quiet enjoyment is broken if the covenantee is prevented from getting possession by reason of a subsisting lease. *Ludwell* v. *Newman* 231

—— 3. A lessee of a house, who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire. *Bullock* v. *Dommitt* . 300

—— 4. **Distress for rent.**—If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer. *Shipwick* v. *Blanchard* 175

—— 5. Wearing apparel may be distrained for rent. *Bisset* v. *Caldwell* 648

—— 6. Right of renewal forfeited by the laches of the tenant. The Court leans against a covenant for perpetual renewal, unless clearly intended. A legal instrument is not to be construed by the acts of the parties. *Baynham* v. *Guy's Hospital* 96

—— 7. If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action for an injury sustained by a stranger from the want of repair. *Payne* v. *Rogers* 415

—— 8. **Modus.**—The Court will not decree against a farm modus (set up by way of defence) on the ground of rankness.

Whether notice is necessary to determine a composition where a modus is insisted upon. *Atkyns* v. *Lord Willoughby de Brooke* 591

—— 9. **Notice to quit.**—A refusal to pay rent to a devisee in a will which was contested is not such a disavowal of the title as to entitle such a devisee to maintain an ejectment without giving a previous notice to quit. *Doe* d. *Williams* v. *Pasquali*. 688

—— 10. Whether a year's notice to quit is necessary, when it has been the custom to give that notice. Qu. *Roe* d. *Henderson* v. *Charnock* . 643

—— 11. **Notice to quit.**—If a landlord receive rent due after the expiration of a notice to quit, it is a waiver of that notice. *Goodright* v. *Cordwent* 161

—— 12. **Occupation by assignees of bankrupt tenant.**—A tenant from year to year of a house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy. *Naish* v. *Tatlock* 384

—— 13. A tenant cannot set up a title against his landlord. *Wilson* v. *Lord Townshend* 31

And see **Tithe, 1.**

LEASE—Parol assigment.—Defendant supposing himself the legal representative of lessee for years sold the term, and delivered the lease to plaintiff but without any assignment or formal conveyance, saying the premises were his, and if anything happened he would see plaintiff righted: Held that plaintiff may maintain an action against him for money had and received, the rightful administrator or tenant for years having ousted the plaintiff by ejectment. *Cripps* v. *Reade* 273

And see **Landlord and Tenant.**

LIBEL.—1. In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original; and if he only set out a translation of it, the Court will arrest the judgment. *Zenobio* v. *Axtell* 142

—— 2. The proprietor of a public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. *Ashley* v. *Harrison* . . . 686

LIEN.—An agreement entered into by a number of dyers, dressers, bleachers, &c., at a public meeting, that they would not receive any more goods to be dyed, &c. &c., but on condition that they should respectively have a lien on those goods for their general balance, is good in law; and anyone, who after notice of it delivers goods to either of those persons, must be taken to have assented to those terms, and consequently cannot demand goods so delivered to any such dyer, &c., without paying the balance of his general account. *Kirkman* v. *Shawcross* 103

MAGISTRATE.—The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of an unqualified person, by stat. 24 Geo. II. c. 44, for it will be presumed that he acted as a justice. *Briggs* v. *Evelyn* . 354

MANDAMUS. *See* **County, 2.**

MARRIAGE—1. **Evidence of.**—The Fleet books are no evidence.

But the general reputation of the family that the parties were married in the Fleet is good evidence.

The registration of a marriage is not absolutely necessary to make it valid. *Reed* v. *Passer* 696

—— 2. **Restraint of.** *See* **Will, 7.**

MARRIED WOMAN—1. **Election.**—*Feme covert* must elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail. Possession taken by her husband under that title does not preclude her election: but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit.

Party claiming under an instrument must claim under the whole.

Election applies to interests of married women, interests immediate, remote, contingent, of value or not of value, real or personal. *Wilson* v. *Lord John Townshend* 31

—— 2. **Liability of husband for wife's contract.**—If a feme covert without any authority from her husband contract with a servant by deed, the servant having performed the service stipulated, may maintain assumpsit against the husband. A person executing a deed for his principal under a power of attorney should sign in the name of the principal. The deed of a surety does not extinguish the simple contract debt of the principal. *White* v. *Cuyler* 147

And see **Will, 21.**

MASTER AND SERVANT.—1. A master may maintain an action for debauching his servant, though he is no ways related to her in blood.

In an action for debauching a servant *per quod*, &c. it is not necessary to prove that she was employed as a menial servant. *Fores* v. *Wilson* . 652

—— 2. An action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know when he employed him that he was the servant of another. *Blake* v. *Lanyon* 162

MISTAKE—of Witness. *See* **Practice, 15.**

MORTGAGE—1. **Equitable.**—The title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen

years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The Court decreed for the plaintiff. *Birch* v. *Ellames* 601

MORTGAGE—2. Title-deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance: this was held good. *Plumb* v. *Fluitt* 605

—— 3. **Interest on disbursements.**—Money disbursed by a mortgagee shall carry the same interest as the original sum. *Woolley* v. *Drage* . 628

—— 4. A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse. *Russel* v. *Smithies* 560

—— 5. **Vexatious action.**—The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought this bill to foreclose; this is regular, and the Court will not stop the proceedings at law, unless the defendant brings in the money. *Rees* v. *Parkinson* 618

NEGLIGENCE—1. No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal or those actually employed are only liable. *Stone* v. *Cartwright* 220

—— 2. A declaration which charges the defendant with having negligently driven his cart against plaintiff's horse is supported by evidence that defendant's servant drove the cart. *Brucker* v. *Fromont* . . 303

—— 3. An action on the case, and not an action of trespass, was the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant negligently driving his carriage against it. *Morley* v. *Gaisford* 432

And see **Carrier.**

NUISANCE—1. **Noxious trade.**—A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is much increased by his manufacture. *Rex* v. *Neville* 662

—— 2. Where a nuisance and purpresture in a harbour are committed, an information in equity lies to abate it.

Where there is a grant from the Crown of land to be recovered from the sea, and it is left unembanked for a long space of time, as a common passage for ships over it, the right of the Crown revives by the length of possession by its subjects. *The Attorney-General* v. *Richards* 632

OATH. *See* **Peer.**

OFFICE—Perquisites.—Money given to A. and claimed by B. as perquisites of office cannot be recovered by B. in an action for money had and received, unless such perquisites be known and accustomed fees. *Boyter* v. *Dodsworth* 315

OFFICER—1. **Half-pay.**—An assignment of the half-pay of an officer in the army is bad in equity as well as at law. *Stone* v. *Lidderdale* . 622

—— 2. The King may at any time stop the half-pay of an officer in the army by signifying his pleasure that it shall be no longer paid. *Macdonald* v. *Steele* 680

OVERSEER—Account.—The accounts of an overseer of the poor should be settled at the end of the year; and if a person be appointed an overseer

for four successive years, and do not make any rate in the three first to reimburse himself what he expends in those years, he cannot in the fourth year make a rate for that purpose. *Rex* v. *James Goodcheap* . . 139

PAROL ASSIGNMENT. *See* **Lease.**

PARTNERSHIP.—1. **Admission of partner.**—In an action for *Assumpsit* against one partner, evidence may be given of the admission of another. *Comme semble. Thwaites* v. *Richardson* 645

—— 2. **Accounts.**—At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expense of entertainments (which were necessary in the trade), fell upon the other. They ought to have agreed for an allowance; the Court can make none.

The accounts having been annually balanced without such allowance, is conclusive. *Thornton* v. *Proctor* 558

—— 3. **Banker—Liability of deceased partner's estate.**—Bankers upon a deposit of money with them gave notes bearing interest. The partnership was dissolved. One of the partners soon afterwards died; and his creditors were called by advertisement. Another partnership was formed by the survivors and others; who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, when they failed. The assets of the deceased partner are not discharged. *Daniel* v. *Cross* 94

—— 4. **Notice of dissolution.**—When partners dissolve their partnership, it is incumbent on them to publish the dissolution in the Gazette, or they will be all liable to an action at suit of a creditor who did not know of the dissolution, and delivered goods to one thinking he was dealing with all. *Gorham* v. *Thompson* 650

—— 5. When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the "Gazette" is not sufficient to discharge them as against those persons who have not seen it. *Graham* v. *Hope* 671

—— 6. A receiver of the stock of a subsisting partnership, while the trade is going on, cannot be appointed; unless upon the very grossest abuse; for it must destroy the trade. *Oliver* v. *Hamilton* 611

PATENT—1. **Agreement to instruct in method of patent.**—By an indenture made between A. (a patentee) and B., which recited an agreement that in consideration of 500*l.* to be paid by B. to A. in manner thereinafter mentioned, A. would instruct B. in his method, and should also permit B. to use his patent, A. in consideration of 250*l.* paid by B. and of the further sum of 250*l.* to be paid, &c., covenanted that he would with all possible expedition instruct B. in his method; and B. covenanted that he would on or before 25th February, 1794, or sooner if A. should before that time have instructed him, &c., pay the further sum of 250*l.*; held that A. might sue B. for the 250*l.* without averring that he had taught B. the method, &c. *Campbell* v. *Jones* 263

—— 2. **Validity.**—A patent was granted to A. B. for a *newly invented method* of using an old machine in a more beneficial manner than was before known. The specification described the *method* as consisting of certain *principles*, and described the mode of applying those principles to the purposes of the inventor in a manner sufficient to enable a mechanic conversant with the engines then in use to construct an engine having the advantages described: Held on error from judgment upon verdict for the plaintiff, that the patent was valid. *Boulton* v. *Bull, Hornblower* v. *Boulton*. 439

PAYMENT—Remittance by post.—If a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss. *Warwicke* v. *Noakes* 653

PEER (SCOTLAND)—Election.—A writ under 6 Ann. c. 23, to certify that a Scotch Peer has taken the oaths in Chancery, does not require a teste; and if the teste is repugnant and impossible, it shall not vitiate. *Marquis of Tweeddale and Others, Petitioners* 571

PERJURY. *See* **Criminal Law, 15.**

POLICY. *See* **Insurance.**

POOR LAW—1. **Settlement of pauper.**—The place of birth is *primâ facie* the place of settlement. *Rex* v. *The Inhabitants of Heaton Norris* 302

—— 2. The facts that a person built a house on land of another by permission of the owner, and that this person and his eldest son occupied the premises for a period of nearly twenty years without disturbance, are sufficient proof of title in a question of pauper settlement. *Semble* that they would have been sufficient in an ejectment. *Rex* v. *The Inhabitants of Butterton* 261

POOR RATE—1. **Appeal.**—If a person rated to the poor has any objection to the rate, *e.g.*, that is made for six months, he must appeal to the next Sessions; and if he do not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate. *Durrant* v. *Boys* . 268

—— 2. **School.**—A master of a free school appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c., were assigned "for the habitation and use of the master and his family freely without payment of any rent, income, gift, sum of money or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants is rateable to the poor for his occupation of the same. *Rex* v. *Catt* . 193

POST-OFFICE—Authorized remittance by—Discharge to sender. *Warwicke* v. *Noakes* 653

And see **Payment.**

POWER OF ATTORNEY—Acceptance of bill of exchange by attorney of executor. *See* **Bill of Exchange, 1, 2.**

PRACTICE—1. **Action against customs' officers.**—An action cannot be maintained against officers of the customs for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; notwithstanding a suit is instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. *Goding* v. *Ferris* 339

—— 2. **Administration of oath.**—A member of the kirk of Scotland may be sworn, without kissing the book. *Mee* v. *Reid* 648

—— 3. **Affidavit—Attestation.**—The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, must be attested by a notary public. But the Court will dispense with such attestation, in the case of an affidavit taken before a great judicial officer in Ireland. *Worsley, Ex parte* . . 378

—— 4. **Affirmation.**—The defendant put in his answer on affirmation without oath, as being a Quaker. *Marsh* v. *Robinson* 617

—— 5. **Bankruptcy of party.**—If a defendant in equity becomes bankrupt, the plaintiff cannot therefore dismiss his own bill without paying costs; it is no abatement.

Bankruptcy of the plaintiff does not abate a suit in equity, and the bill may therefore be dismissed with costs for want of prosecution. *Rutherford* v. *Miller* 611

—— 6. **Costs.**—No action will lie in this Court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having

been brought, the Court ordered the costs awarded to the plaintiff in the inferior court, to be deducted by the prothonotary from those allowed to the defendant in the action. *Emerson* v. *Lashley* 370

PRACTICE.—7. Where, to an action of trespass, the defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40*s*., and the judge at the trial does not certify. *Redridge* v. *Palmer* . 338

—— 8. Where there are costs in equity and at law due from the opposite parties, the Court will not set off the costs at law against those in equity if the solicitor in equity claims his lien on the latter. *Smith* v. *Brocklesby* 547

—— 9. **Detention of witness.**—The Court will put off the trial on the affidavit of the defendant's attorney that a material witness is kept out of the way by the plaintiff. *Duberly* v. *Gunning* 664

—— 10. A terrier cannot be received in evidence, unless it comes from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found. *Atkyns* v. *Hatton* . . 589

—— 11. To set aside proceedings for want of authority, the evidence of the person in whose name the proceedings are taken should be tendered or its omission accounted for. *Heath* v. *Yeomans* 589

—— 12. If at the trial of a cause, the counsel on both sides argue upon the effect of an instrument, as being in evidence, and it is by mistake never in fact produced, after verdict for the plaintiff, the defendant cannot take advantage of the omission. *Doe* d. *Duplex* v. *Penry* 586

—— 13. A debt on a judgment against a testator or intestate, not docketed according to the directions of the stat. 4 & 5 W. & M. c. 20, is put by that act on a level with simple contract debts. On a plea of *plenè administravit*, to debt on a judgment against the intestate not docketed, the defendant may give in evidence payment of bond and other specialty debts, which exhausted all the assets. *Hickey* v. *Hayter* 213

—— 14. **Inspection of books.**—The defendant being sued as executor, admitted to have in his possession certain books, containing the accounts of the estate. He was ordered to deposit them in the hands of the Deputy Remembrancer, for the inspection of the plaintiff. It was afterwards referred to that officer to take an account of the estate. The defendant, in order to make out such account, applied to be allowed to inspect and take copies of the books. This was refused at the office, unless he would pay for office copies.

The defendant moved that he might have this liberty as his right. The motion was allowed. *Gabbit* v. *Cavendish* 627

—— 15. **Mistake of witness—Nonsuit.**—If the plaintiff is nonsuited by mistake of a witness in the most material part of the cause, a new trial ought to be granted. *De Giou* v. *Dover* 619

—— 16. **Security for costs.**—After the defendant has agreed to take short notice of trial, the Court will not compel the plaintiff, a foreigner, and resident abroad, to give security for costs. *Michel* v. *Pareski* . . 512

—— 17. **Security for costs.**—Motion that proceedings should be stayed till the plaintiff, who, since filing the bill, was become bankrupt, should give security for costs.

This was refused, as not being supported by the practice of the Court in any instance. *Anonymous* 595

—— 18. **Signature of notice.**—A plaintiff may sue in his own name, without an attorney, and subscribe the process with his name as attorney for the plaintiff, in any action. *La Grue* v. *Penny* 519

—— 19. **Variation in pleadings.**—Action to try a right of way, which was stated to be from a certain highway leading from the parish of L. to B.

The highway was proved to be, at that part, within the parish of L. This is no variance. *Philips* v. *Davies* 629

And see **Fishery.**

PROMISSORY NOTE—1. **Discharge of indorser.**—A person who undertakes to become security for a debt, and does so by indorsing a promissory note of the debtor, which is handed to the creditor, is discharged by want of due presentment of the note for payment to the principal debtor, although the creditor knows that it will not be paid by him. *Nicholson* v. *Gouthit* 527

—— 2. **Notice to indorser.**—A. makes a promissory note payable to B. or order, with a memorandum upon it that it will be paid at the house of C., who is A.'s banker; in the course of business the note is indorsed to C. In an action by C. against the indorser, it is not necessary to prove an actual demand on A.

If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker.

The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser. *Saunderson* v. *Judge* 492

—— 3. **Rights of indorser.**—A man who at the request of the holder of a note, has put his name upon it and thereby been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration. *Seddons* v. *Stratford* 693

—— 4. A promissory note signed by two persons, and beginning "I promise," &c., is joint and several. *March* v. *Ward* 667

PUBLIC HOUSE—Restrictive covenant in lease of. *See* **Vendor and Purchaser,** 2.

QUAKER—Affirmation of. *See* **Practice.**

RECTOR. *See* **Tithe.**

RENT—Distraint for. *See* **Landlord and Tenant,** 4, 5.

REPAIR—Of buildings by mortgagee. *See* **Mortgage,** 4.

RIGHT OF WAY. *See* **Practice,** 19.

SAILOR—Wages of. *See* **Ship,** 4, 5, 6.

SALE OF GOODS—1. **Delivery**—A. agrees to sell goods to B. who pays a certain sum of money as earnest; the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them, but A. declares at the same time that they shall not be carried away till he is paid. This is not a delivery to B. *Goodall* v. *Skelton* . 379

—— 2. **Spirituous liquors under value of twenty-shillings.**—The statute of the 24 Geo. II. against selling liquors in quantities under the value of 20*s*. does not extend to liquors sold for the purpose of being sold again. *Jackson* v. *Attrill* 683

—— 3. **Warranty of horse.**—Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, &c., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to

maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term trial means a reasonable trial. *Adam* v. *Richards* . . . 508

SALVAGE.—A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path. A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. A. has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation. But in such a case, in all probability, A. might maintain an action against the owner for a compensation. *Nicholson* v. *Chapman* 374

SCHOOL. *See* **Poor Rate, 2.**

SCOTCH PEER. *See* **Peer.**

SEDUCTION—1. **Action for.** *See* **Master and Servant, 1.**

—— 2. **Enticing away.** *See* **Master and Servant, 2.**

SETTLEMENT—**Of pauper.**—An adult who leaves her father's house and goes into service becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father. *Rex* v. *The Inhabitants of Roach* 169
And see **Poor Law.**

SETTLEMENT (MARRIAGE) — Construction.—Under marriage articles 15,000*l.* was vested in trustees on trust together with 5,000*l.* covenanted by the husband to be paid, to be laid out in land, to be settled upon the husband for life; remainder to the wife for life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations and provisions, as the husband and wife or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.* and directing them to deliver the said stock, &c., to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust fund, but that the said fund with its increase should be taken out of his personal estate, gave 10,000*l.* part of the trust fund, in trust to be laid out in land to be conveyed to one daughter for life for her separate use; remainder to her children in tail; remainder to the other daughter in fee; for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage. Held 1st, that grandchildren are not objects of the power, but the excess only would be void: 2ndly, the fund with its increase was invested in the purchase: 3rdly, there was no appointment of the estate or money due on the covenant: 4thly, the remainders in default of appointment are vested, subject to be devested by appointment, and will take effect as to what is ill appointed or unappointed: 5thly, the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied.

Husband is not to account for the income of his wife's separate estate, which she permitted him to receive.

Father having power to appoint among children and purchasing the share of one cannot by appointment entitle himself to more than the share of that child in default of appointment. *Smith* v. *Lord Camelford. Lord Camelford* v. *Smith* 36

SEXTON. *See* **Office.**

SHERIFF.—The sheriff having directed a warrant to A. and all his other officers to arrest B., A. afterwards inserted that of C.; held that the warrant was illegal, and the arrest by C. consequently void. *Housin* v. *Barrow* 135

SHIP—1. **Agreement not to institute suit against master in foreign country.**—Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country and the adjudication of their own Courts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship and cargo be confiscated in an English port, and the voyage thereby ended. *Gienar* v. *Meyer* 520

—— 2. **Demurrage.**—Demurrage ceases on the day of sailing [or readiness to sail] from the port of lading; and if a ship afterwards puts back by reason of contrary winds and is detained (by frost for example), the freighter is not liable. *John Jamieson & Co.* v. *Laurie* 725

—— 3. **Liability for loss.**—If a ship be chartered to the East India Company for the purpose of trade or warfare, and they order her on a voyage of discovery, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage. *Lewin* v. *The East India Company* 700

—— 4. **Wages of seaman.**—A seaman belonging to a merchant ship which is articled for a certain voyage, is prevented from performing the whole voyage by being disabled by an accident happening in the course of his duty; he is entitled to wages for the whole voyage. *Chandler* v. *Grieves* 525

—— 5. No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship. *Harris* v. *Watson* . 654

—— 6. If a sailor hired for a voyage take a promissory note from his employer for a certain sum provided he proceed, continue and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*. *Cutter* v. *Powell* 185

And see **Bill of Lading; Custom, 2;** *and* **Tender, 2.**

SLANDER—1. **Damages under forty shillings—Costs.**—The simply saying to another "you are a swindler," is not actionable. Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40*s*. he is entitled to full costs. *Savile* v. *Jardine* 502

—— 2. Saying of the plaintiff that he has forsworn himself, and that the defendant had three evidences that would prove it, is not actionable without slewing that the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn. Where some counts in a declaration are good and some bad in law, and general damages are given, the Court will arrest the judgment *in toto*, and will not award a *venire de novo*. *Holt* v. *Scholefield* 318

—— 3. Words actionable in themselves as containing a charge of felony, if spoken in reference to a trespass or breach of contract, are not so. *Cristie* v. *Cowell* 642

SOLICITOR—1. **Affidavit.**—If an attorney, required to answer the

matters of an affidavit, swear in his exculpation to an incredible story, the Court will grant an attachment against him, though he positively deny the malpractices imputed to him. *Re Crossley, Clarke, and Brierly* . . 322

—— 2. **Costs.**—The lien of the plaintiff's attorney upon the debt and costs recovered in the cause must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff, upon a summary application to the Court. *Randle* v. *Fuller* . . 230

—— 3. If the defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit. *Read* v. *Dupper* 200

—— 4. Plaintiff may sign process as solicitor for himself. *See* **Practice**, 18.

—— 5. **Lien of.** *See* **Practice**, 8.

And see **Interpreter.**

SPECIFIC PERFORMANCE. *See* **Vendor and Purchaser**, 3, 4.

STATUTE—Evidence to explain.—The 27 Geo. III. c. 28, s. 5 (relating to the taxation of plate-glass), by the word square, means all rectangular figures only.

No evidence of the technical meaning of the word in the trade, can be admitted to explain the statute. *The Attorney-General* v. *The Cast-plate Glass Company* 543

—— **Construction of.** *See* **Criminal Law**, 1.

SUNDAY—Arrest.—Arrest upon Monday following upon a forcible detention on Sunday, is void as an arrest upon Sunday. *Lyford* v. *Tyrrel* 553

SURETY.—Obligee in a bond with a surety without communication with the surety takes notes from the principal, and gives farther time; the surety is discharged. *Rees* v. *Berrington* 3

And see **Promissory Note.**

SURVEYOR—Fees.—A surveyor is to be paid according to his labour, and not according to the amount of the bills he looks over and settles. *Upsdell* v. *Stewart* 685

TENANT IN COMMON.—One tenant in common cannot avow alone for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion. *Culley* v. *Spearman* 420

TENDER—1. If on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt. *Cole* v. *Blake* 681

—— 2. If A. be indebted to several persons in different sums of money, and when they are all assembled together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. It is not necessary to produce the money tendered when the creditor insists on more being due. *Black* v. *Smith* 661

And see **Guaranty.**

TIPPLING ACT. *See* **Sale of Goods**, 2.

TITHE—1. **Agreement not to take tithes in kind.**—Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre; and thereto

bound himself and his assigns. His under-lessee sued (in the name of a trustee to whom he had nominally again under-leased) for tithes in kind against the tenant of the land, and had a decree. Such an agreement is void for the uncertainty of the sum to be paid.

The lessee of the land cannot claim to hold discharged of tithes under any covenant with his lessor.

An under-lessee is not an assign within the meaning of the covenant: nor can the tithes be bound by such a covenant of the lessee.

A lease of tithes, or other matter which lies in grant, for all the time the lessor should continue vicar, is good, and conveys a freehold. *Brewer* v. *Hill* 596

TITHE.—2. A rector having come to an agreement with his parishioners for a composition for tithes, cannot bring a suit in equity for an account of tithes, and in that suit set up his own non-residence as making the agreement invalid under 13 Eliz. c. 20, and 14 Eliz. c. 11, s. 15. *Atkinson* v. *Folkes* 548

—— 3. **Evidence of title to.** *See* **Practice**, 10.

TITLE.—Bill prayed that the defendant might state the particulars of his pedigree as heir and of the births, baptisms, marriages, deaths, or burials: demurrer allowed. *Ivy* v. *Kekewick* 30

TRADE—Wrongful hindrance of.—An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the plaintiff. And it is no answer to such action that the plaintiff had not conformed to the law of the country in paying the duty due to the King for his licence to trade. *Tarleton* v. *M'Gawley* . 689

TREASON. *See* **Criminal Law**, 9.

TREASURER—Of county. *See* **County**, 2.

TRESPASS. *See* **Bastardy**; **Negligence**, 3.

TRUST—Election of Trustees.—A trust consisting of 25 persons, who are to proceed to elect new trustees, so as to fill up their number, when they shall be reduced to 15, may elect before that time.

A majority of trustees may bring actions in the name of the whole.

Neither a tenant in common nor any other can be admitted a defendant in ejectment without confessing lease, entry, and *ouster*. *Doe* d. *Dupleix* v. *Roe* 554

And see **Chattel.**

TRUSTEE.—Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name. Demurrer, because the *cestuis que trust* were not parties, overruled with costs. *Franco* v. *Franco* 50

TRUSTEES—For repair of chapel. *See* **Chapel**, 1.

—— **For sale—Conduct of.** *See* **Injunction.**

VENDOR AND PURCHASER—1. Liability for use and occupation.—Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance at a considerable expense enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation. *Hearn* v. *Tomlin* 684

—— 2. **Restrictive covenant.**—A man is not obliged to accept a conveyance when the title is doubtful. *Hartley* v. *Pehall* 668

VENDOR AND PURCHASER—3. **Specific performance.**—A. devised the residue of his property to his wife, in trust, to divide it among their children in such manner as they should deserve. One of the seven children sold her share, and covenanted to make it up a full seventh. This is good; and on a bill for a specific performance, she can make a good conveyance without the mother joining. *Musprat* v. *Gordon* 541

—— 4. **Specific performance.**—By the terms of an auction, the title-deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection; he cannot afterwards, on disliking the title, object to the delay. *Smith* v. *Burnam* . 620

VESTRY. *See* **Churchwarden, 1.**

WAGER.—No action will lie on a wager respecting the mode of playing an illegal game; and if such a cause be set down for trial, the judge at *Nisi Prius* will order it to be struck out of the paper. *Brown* v. *Leeson* . 341

WAGES—Of seamen. *See* **Ship, 4, 5, 6.**

WARRANTY. *See* **Sale of Goods, 3.**

WEARING APPAREL—Distraint for rent upon. *See* **Landlord and Tenant, 5.**

WIFE. *See* **Husband and Wife.**

WILL—1. **Administration.**—Devise after payment of debts: the debts are charged. Distinction between debts and legacies in an implied charge upon an estate specifically devised. *Shallcross* v. *Finden* . . 75

—— 2. Real estates devised held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expenses should be first paid: that, which descended to the heir by the failure of the devise, to be first applied. *Williams* v. *Chitty; Chitty* v. *Chitty* 71

—— 3. Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended; but this arrangement does not bind the creditor.

The order of application to debts: 1st, the personal estate, unless exempted expressly or by plain implication: 2ndly, estates devised for the particular purpose of paying debts: 3rdly, estates descended: 4thly, estates devised. *Manning* v. *Spooner* 67

—— 4. **Advowson—Remoteness.**—A. devises an advowson to the first or other son of B. that should be bred a clergyman, and be in holy orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; therefore though B. dies without having had a son, the heir at law of the devisor, and not C., is entitled. *Proctor* v. *The Bishop of Bath and Wells* 417

—— 5. **Appointment.**—Money settled in trust to be paid according to the appointment of A., and in default thereof to his legal representatives according to the course of administration; A. by will in pursuance of the power appoints to his legal representatives according to the course of administration; and makes a residuary legatee, whom he appoints one of his executors. Upon the will the next of kin are entitled. *Jennings* v. *Gallimore* 77

—— 6. **Debts—Exemption of personal estate.**—Under a devise to sell and pay debts and funeral expenses, the personal estate was exempted without express words upon the evident intention.

Where there is an express direction in a will, that the debts, &c., shall be paid out of the real estate, the person, to whom the personal is bequeathed, takes it exempt. *Burton* v. *Knowlton* 62

WILL—7. **Condition in restraint of marriage.**—Condition in restraint of marriage under twenty-one without consent of trustees established both as to a rent-charge out of real estate and a personal legacy.

Testator devised his real estates to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry (if under twenty-one, with consent of trustees), for their joint lives and that of the survivor, with similar remainders. He also gave a rent-charge limited in the same manner to the second, her husband and issue male; and gave a similar rent-charge to the youngest, until she shall marry (under and with the restriction above mentioned), or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage he gave the youngest a legacy of 10,000*l.*, payable 5,000*l.* upon her marriage (with such consent as aforesaid), and 5,000*l.* two years after. Upon her marriage without consent the condition being established against the husband does not affect her estate for life in the rent-charge. *Stackpole* v. *Beaumont* . 52

—— 8. **Construction.**—A. tenant in tail with power to lease, remainder to B. wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power made leases exceeding his power, reciting that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him: A. by his will devised the said estates and others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter and her first and other sons, and to D. and his first and other sons, successively in the same manner; and gave to B. and C. certain interests in his personal estate; and gave the residue to D.; who filed a bill to have the will established: B. elected to take her estate tail in opposition to the will; which the Master reported to be for her benefit: after her death C., who had taken under the will, claimed as tenant by the curtesy; and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements: neither the lessees nor D. are entitled to stop the ejectments or to put C. to his election: but an injunction was granted on their undertaking to bring on their causes the following term. *Lady Cavan* v. *Pulteney*, *Earl of Darlington* v. *Pulteney* 8

—— 9. Devise for payment of debts; the trustees convey to A. B. for the purposes of the trust; A. B. mortgages to several persons who have notice of the trust; these mortgages are good.

Devisees in trust to sell for payment of debts, assign to the son of the devisor, the creditors receive the interest from him for eleven years, and agree with him for an increase of interest on their debts; the original trustees continue liable.

A mortgagee takes a bond from the assignee of the devisee for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage.

The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time; they lie by for 11 years, and the estate is wasted: yet the legatees shall refund. *Hardwick* v. *Mynd* 562

—— 10. The testator, having given 4,000*l.* to A. and B. in trust for certain persons, by a residuary clause gave "All the rest of his estate and effects of what nature soever to A. and B. their executors and administrators in trust to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid:"—held that a house, the only freehold house of which the testator was seised, did not pass by the

will, notwithstanding there were general words in the introductory clause "as to all his estate and effects both real and personal." *Doe* d. *Spearing* v. *Buckner* 278

WILL.—11. Lands, &c., are devised to B. for life, and after his decease to all and every such child or children of B. as shall be living at the time of his decease: a posthumous child of B. shall share equally with those who were born in his lifetime. An infant *en ventre sa mère* is considered as born, for all purposes which are for his benefit. *Doe* d. *Clarke* v. *Clarke* . . 431

—— 12. Where two legacies of the same sum are bequeathed to the same person by different instruments, viz., one in a will, and the other in a codicil, the legatee is entitled to both, unless a contrary intention appears on the face of the instruments when read together. *James* v. *Semmens* 362

—— 13. A. by his will reciting "as to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and "devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever to B. for his own use, benefit, and disposal." Under this clause, B. took an estate in fee in the lands of the testator. *Smith* v. *Coffin* 435

—— 14. A testator devised an estate to his "grand-daughter, Mary Thomas, of X., in the parish of Y." On the evidence it appeared that at the time of his death (and of the reading of the will), there was a grand-daughter, living at X., in the parish of Y., but her name was Elinor Evans; and there was a great grand-daughter, Mary Thomas (who was an infant of two years), living in the parish of Z., some miles from Y. On this evidence it was held to be uncertain which of the two was intended, and the devise was held void as against the heir at law. *Thomas* v. *Thomas* 306

—— 15. Devise of "all the devisor's estates to A. and the issue of her body, as tenants in common, but in default of such issue, or being such if they should all die under twenty-one and without leaving issue," then over: held, that all the limitations subsequent to that to A. were contingent, and were consequently destroyed by a recovery suffered by A. *Doe* d. *Davy* v. *Burnsall* 113

—— 16. Under a devise of lands to trustees in fee in trust for A. (an infant) for ninety-nine years if he shall so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of ninety-nine years, as they shall be in seniority of birth, and in default of such issue male in him or them, then to B. and the issue male of his body for the like term of ninety-nine years, and in default of such issue male then to the right heirs of the devisor, A. takes an estate for ninety-nine years determinable with his life, and upon his death his first son takes a like estate; but the subsequent limitations to his other sons and to B. are void. *Somerville* v. *Lethbridge* 157

—— 17. A., after giving different annuities to an only son increasing at different ages till thirty, and to be paid to him until he married, devised thus:—"In case my son shall happen to marry before he attains the age of thirty, then I give and devise to him and the heirs of his body all my real and personal estates, &c., and if my son should happen to die without leaving issue of his body, then I give and devise the same to my brother B." Held that the son took an estate tail in the real estates, and the personal estate absolutely. *Daintry* v. *Daintry* 179

—— 18. The word "farm" in a will is sufficient to pass a leasehold estate if it appear to have been the testator's intention that it should so pass. A. being seised of several freehold estates, and possessed of part of a farm held by a church lease renewable (the other part of the farm being freehold, and the whole having been always let together as one entire farm, at one rent), devised "all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estates whatsoever," to B.; and gave "all the rest and

residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to C.; held that the leasehold part of the farm passed under the first devise. *Lane* v. *Earl Stanhope* . . . 197

WILL.—19. Devise to Margaret (an only child) for life, remainder to the first son of her body "if living at the time of her death," and the heirs male of such son, and for default of such issue to the second son of her body "if living at the time of her death," and the heirs male of such second son, &c.; and for default of such issue male, remainder to A.; Margaret had one son, who died in her lifetime leaving a son; held that Margaret only took an estate for life, and that neither her son nor grandson took any estate, but that the remainder to A. took effect. *Denn* d. *Radclyffe* v. *Bagshaw* . . 242

—— 20. **Direction.**—A testator directs that the business shall be carried on by E. P. The executors permit E. P. to get in the outstanding debts. There being no such direction in the will, the executors are liable. *Pistor* v. *Dunbar* 561

—— 21. **Election.**—Husband and wife by indenture assigned in trust for the husband personal property, bequeathed to the wife and in possession of the administrator; the husband by will gave the residue of his real and personal estates in trust for his wife for her separate use for life, remainder over; and died: upon the bill of the wife and her second husband claiming against the deed, being put to her election, she elected to take under the will; and the bill was dismissed. *Wright* v. *Rutter* 24

—— 22. **Legacy.**—Under a legacy to the issue of A., all descendants are entitled, and take *per capita* as joint-tenants.

"Equally" makes a tenancy in common. *Davenport* v. *Hanbury* . 91

—— 23. Legacy to Mrs. G. Evidence admitted. Executor, refusing to act, cannot take a legacy to him as executor. *Abbot* v. *Massie* . . 79

And see **Landlord and Tenant**, 9; **Settlement (Marriage)**; **Vendor and Purchaser**, 3; **Copyhold**; *and* **Executor**.

WITNESS—Mistake of. *See* **Practice**, 15.

END OF VOL. III.

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